The Senate

Legal and Constitutional Legislation Committee

Provisions of the Anti-Terrorism Bill (No. 2) 2005

November 2005

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RECOMMENDATIONS

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.

Recommendation 2

3.152 The committee recommends that proposed section 105.12 be amended, or a new provision inserted into the Bill, to provide a detainee with an express statutory right to present information to the independent issuing authority for a continued preventative detention order, to be legally represented and to obtain the published reasons for the issuing authority's decision.

Recommendation 3

3.153 The committee recommends that:

(i) the Bill be amended to expressly require that young people between the ages of 16 and 18 years of age must not be detained with adults while in police custody;

(ii) proposed section 105.27 be amended to require the segregation of minors from adults in State and Territory facilities; and

(iii) proposed section 105.33 be amended to expressly require that minors must be treated in a manner that is consistent with their status as minors who are not arrested on a criminal charge.

Recommendation 4

3.154 The committee recommends that proposed section 105.28 be amended to place an obligation on police officers to ensure access to a detainee by a lawyer and an interpreter, as necessary, in cases where there are reasonable grounds to believe that the detainee is unable to understand fully the effect of the preventative detention order because of inadequate knowledge of the English language or a mental or physical disability.

Recommendation 5

3.155 The committee recommends that proposed sections 105.28 and 105.29 be amended to expressly require that detainees be advised that they can make representations to the nominated senior AFP member concerning revocation of the preventative detention order.

Recommendation 6

3.156 The committee recommends that proposed section 105.28 be amended to expressly require that the detainee be advised that he or she can contact the family members referred to in proposed section 105.35.

Recommendation 7

3.157 The committee recommends that proposed section 105.32 be amended to provide that the detainee shall be provided with a copy of the order and the reasons for the decision, including the materials on which the order is based, subject to any redactions or omissions made by the issuing authority on the basis that disclosure of the information concerned is 'likely to prejudice on national security' (as defined in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)).

Recommendation 8

3.158 The committee recommends that proposed sections 105.15 and 105.16 be amended to elaborate the grounds for a prohibited contact order. The committee also recommends that these grounds be equivalent to those provided in the UK terrorism legislation, namely:

(i) interference with or harm to evidence of a terrorism related offence;

(ii) interference with or physical injury to any person;

(iii) alerting of persons suspected of a terrorism related offence who have not been arrested;

(iv) hindering recovery of property obtained as a result of a terrorism related offence;

(v) interference with gathering information about the commission, preparation or instigation of acts of terrorism; and

(vi) alerting a person and thereby making it more difficult to prevent an act of terrorism.

Recommendation 9

3.159 The committee recommends that the Bill be amended to:

(i) authorise oversight by the Commonwealth Ombudsman of the preventative detention regime, including conferral of a statutory right for the Ombudsman to enter any place used for detention under a preventative detention order; and

(ii) require the nominated senior AFP officer - in circumstances when a legal adviser is not available to the detainee - to notify the Ombudsman when a preventative detention order and a prohibited contact order is made and to provide the Ombudsman with a copy of any such order and reasons for those orders.

Recommendation 10

3.160 The committee recommends that the Bill be amended to require the Minister - in consultation with HREOC, the Ombudsman and the Inspector-General for Intelligence and Security – to develop a Protocol governing the minimum conditions of detention and standards of treatment applicable to any person who is the subject of a preventative detention order.

Recommendation 11

3.161 The committee recommends that proposed paragraph 105.41(3)(c) be amended to refer to the persons whom the detainee has a right to contact instead of persons with whom the detainee has had contact.

Recommendation 12

3.162 The committee recommends that proposed subsection 105.42(1) be amended to require that any questioning which takes place during the period of the preventative detention order be videotaped and generally occur in the presence of the detainee's lawyer.

Recommendation 13

3.163 The committee recommends that the Bill be amended to remove the restrictions on lawyer/client communications and to allow a legal representative to advise his/her client on any matter. The committee also recommends that proposed section 105.37 be amended to affirm the right of a detainee, subject to a prohibited contact order, to contact their lawyer of choice and to consult their lawyer at any time and in privately.

Recommendation 14

3.164 The committee recommends that proposed section 105.38 be amended to permit monitoring of detainees' consultation with their lawyers only where the nominated AFP officer has reasonable grounds to believe that the consultation will interfere with the purpose of the order.

Recommendation 15

3.165 The committee recommends that the Bill be amended to prohibit reliance on hearsay evidence in proceedings for the issue of a continued preventative detention order.

Recommendation 16

3.166 The committee recommends that proposed section 105.47 be amended to require the Attorney General to report on Commonwealth preventative detention orders on a six monthly basis and that, in addition to the matters currently set out in that provision, the information should include the number of orders voided or set aside by the AAT.

Recommendation 17

3.167 The committee recommends that the Bill be amended to include an express requirement for a public and independent five year review of the operation of Division 105 adopting the same mechanism and similar terms as that provided by section 4 of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), which established the Sheller Committee.

Recommendation 18

3.168 The committee recommends that proposed section 105.53 be amended to include a sunset clause of five years applicable to Schedule 4.

Recommendation 19

4.56 The committee recommends that proposed sections 104.2, 104.4, 104.7-9 and 104.14 be amended to include a requirement that the AFP officer, the Attorney General and the issuing Court each be satisfied that the application and making of the control order and the terms in which it is sought and issued is the least restrictive means of achieving the purpose of the order.

Recommendation 20

4.57 The committee recommends that proposed section 104.5 be amended to require that the day of the hearing to confirm, vary or revoke the order must be set as soon as is reasonably practicable after the making of the order.

Recommendation 21

4.58 The committee recommends that proposed section 104.12 be amended to require police officers to arrange access to a detainee by a lawyer and an interpreter, as necessary, in cases where there are reasonable grounds to believe that the detainee is unable to understand fully the effect of control order because of an inadequate knowledge of the English language or a mental or physical disability.

Recommendation 22

4.59 The committee recommends that the Bill be amended to prohibit reliance on hearsay evidence in a proceeding for the grant of continued control order.

Recommendation 23

4.60 The committee recommends that proposed section 104.12 be amended to provide that the detainee shall be provided with a copy of the order and the reasons for the decision, including the materials on which the order is based, subject to any redactions or omissions made by the issuing authority on the basis that disclosure of the information concerned is 'likely to prejudice on national security' (as defined in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth))

Recommendation 24

4.61 The committee recommends that proposed section 104.29 be amended to require the Attorney-General to report to the Parliament on control orders on a six monthly basis.

Recommendation 25

4.62 The committee recommends that the Bill be amended by inserting an express requirement for a public and independent 5 year review of the operation of Division 104, adopting the same mechanism and similar terms to that provided by section 4 of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), which established the Sheller Committee.

Recommendation 26

4.63 The committee recommends that proposed section 104.32 be amended to provide a sunset period of five years.

Recommendation 27

5.173 The committee recommends that Schedule 7 be removed from the Bill in its entirety.

Recommendation 28

5.174 The committee recommends that the Australian Law Reform Commission conduct a public inquiry into the appropriate legislative vehicle for addressing the issue of incitement to terrorism. This review should examine, among other matters, the need for sedition provisions such as those contained in Schedule 7, as well as the existing offences against the government and Constitution in Part II and Part IIA of the *Crimes Act 1914*.

Recommendation 29

5.176 If the above recommendation to remove Schedule 7 from the Bill is not accepted, the committee recommends that:

- **proposed subsections 80.2(7) and 80.2(8) in Schedule 7 be amended to require a link to force or violence and to remove the phrase 'by any means whatever';**
- **all offences in proposed section 80.2 in Schedule 7 be amended to expressly require intentional urging; and**
- **proposed section 80.3 (the defence for acts done 'in good faith') in Schedule 7 be amended to remove the words 'in good faith' and extend the defence to include statements for journalistic, educational, artistic, scientific, religious or public interest purposes (along the lines of the defence in section 18D of the *Racial Discrimination Act 1975*).**

Recommendation 30

5.233 The committee recommends that the amendments in Schedule 1 of the Bill, relating to advocacy of terrorism, be included in the proposed review by the Australian Law Reform Commission as recommended above in relation to Schedule 7.

Recommendation 31

5.236 The committee recommends that proposed paragraph (c) of the definition of 'advocates' in Item 9 of Schedule 1 be amended to require that the praise be made with the intention, or in circumstances where it is likely to have the effect, of creating a substantial risk of a terrorist act occurring.

Recommendation 32

5.239 The committee recommends that the proposed definition of 'advocates' in Item 9 of Schedule 1 be amended to include criteria to clarify the circumstances to be taken into account in determining whether an 'organisation' may be considered to 'advocate terrorism'. This criteria could include, for example, that the statements advocating terrorism are made by the acknowledged leader of the organisation; are made on official material distributed or speeches given by the leader or organisation; and the statements are made on multiple occasions.

Recommendation 33

6.66 The committee recommends that all police who exercise the new stop, question, detain, search and seizure powers under Schedule 5 of the Bill be required to undergo comprehensive training as to their obligations under Commonwealth and state and territory discrimination legislation.

Recommendation 34

6.67 The committee recommends that proposed section 3UD of Schedule 5 of the Bill be amended to include a requirement that, as far as possible, body searches are to be conducted in private.

Recommendation 35

6.68 The committee recommends that proposed section 3UD of Schedule 5 of the Bill be amended to include a requirement that body searches be carried out by police officers of the same sex as the person being searched.

Recommendation 36

6.69 The committee recommends that Schedule 5 of the Bill be amended to include a requirement that all police forces keep comprehensive records in relation to any exercise of the proposed stop, question, detain, search and seizure powers in Schedule 5.

Recommendation 37

6.70 The committee recommends that the Commonwealth Ombudsman be tasked with comprehensive oversight of the use of the proposed stop, question, detain, search and seizure powers under Schedule 5 of the Bill.

Recommendation 38

6.71 The committee recommends that the sunset clause applicable to Schedule 5 be amended to apply for a period of five years.

Recommendation 39

6.72 The committee recommends that the Bill be amended by inserting an express requirement for a public and independent five year review of the operation of Schedule 5.

Recommendation 40

6.145 The committee recommends that proposed section 3ZQR of Schedule 6 of the Bill be amended to preserve absolutely legal professional privilege and other duties of confidence, including the duty of journalists not to reveal their sources, in respect of any documents or information sought under the notice to produce regime in Schedule 6.

Recommendation 41

6.146 The committee recommends that proposed section 3ZQO of Schedule 6 of the Bill be amended to better protect the capture of extraneous and possibly sensitive information from the scope of the notice to produce regime for serious (non-terrorism) offences. That is:

- **proposed section 3ZQO be amended to include the capacity for a notice to require the production of either 'information' or of 'documents';**
- **proposed subsection 3ZQO(2) be amended to specifically require Federal Magistrates to consider also whether:**

- **it is appropriate that the notice require the production of 'documents' rather than 'information'; and**
- **in cases where documents are sought, whether the source and documents nominated are the most appropriate ones for obtaining the information of relevance to the investigation.**

Recommendation 42

6.147 The committee recommends that a set of best practice procedures and guidelines be developed in consultation with the Office of the Privacy Commissioner to govern the collection, use, handling, retention and disposal of personal information acquired under the powers in Schedules 5, 6 and 8 of the Bill.

Recommendation 43

6.148 The committee recommends that the Bill be amended to include a sunset clause of five years applicable to Schedule 6.

Recommendation 44

6.149 The committee recommends that the Bill be amended by inserting an express requirement for a public and independent five year review of the operation of Schedule 6.

Recommendation 45

6.187 The committee recommends that Items 12 and 16-20 of Schedule 10 of the Bill be amended to limit the provisions extending the time periods for validity of search warrants to ASIO investigations specifically relating to suspected terrorist activities and terrorism offences only.

Recommendation 46

6.188 The committee recommends that Items 23 and 24 of Schedule 10 of the Bill be amended to clarify that the power allowing for the removal and retention of material found during the execution of an ASIO search warrant, for 'such time as is reasonable' unless its return would be 'prejudicial to security', does not encompass a power to confiscate the material absolutely.

Recommendation 47

6.189 The committee recommends that ASIO, in consultation with the Inspector-General of Intelligence and Security, develop a set of best practice procedures and guidelines to govern the collection, use, handling, retention and disposal of personal information acquired under its expanded powers in Schedule 10 of the Bill.

Recommendation 48

6.190 The committee recommends that the Bill be amended to include a sunset clause of five years applicable to Schedule 10.

Recommendation 49

6.191 The committee recommends that the Bill be amended by inserting an express requirement for a public and independent five year review of the operation of Schedule 10.

Recommendation 50

7.45 The committee recommends that clause 2 of the Bill be amended to provide that Schedule 9 of the Bill shall commence on 'a date to be proclaimed'.

Recommendation 51

7.73 The committee recommends that the Bill be amended to provide that Schedule 3 of the Bill shall be subject to a public and independent five year review.

Recommendation 52

7.74 Subject to the above recommendations, the committee recommends that the Senate pass the Bill.

ABBREVIATIONS

ABC	Australian Broadcasting Corporation
AFP	Australian Federal Police
AFP Act	*Australian Federal Police Act 1979*
ALHR	Australian Lawyers for Human Rights
ALRC	Australian Law Reform Commission
AML	anti-money laundering
AMCRAN	Australian Muslim Civil Rights Advocacy Network
APC	Australian Press Council
APF	Australian Privacy Foundation
ASDA	Australian Screen Directors Association
ASIO	Australian Security Intelligence Organisation
ASIO Act	*Australian Security Intelligence Organisation Act 1979*
AUSTRAC	Australian Transaction Reports and Analysis Centre
Bill	Anti-Terrorism Bill (No. 2) 2005
Bills Digest	Sue Harris Rimmer, Ann Palmer, Angus Martyn, Jerome Davidson, Roy Jordan and Moira Coombs, Parliamentary Library, *Anti-Terrorism Bill (No. 2) 2005*, Bills Digest No. 64 2005-06, 18 November 2005
CFT	combating the financing of terrorism
CRC	Convention on the Rights of the Child
Crimes Act	*Crimes Act 1914*
Criminal Code	*Criminal Code Act 1995*
Customs Act	*Customs Act 1901*
Customs Administration Act	*Customs Administration Act 1985*

Department	Attorney-General's Department
Evidence Act	Evidence Act 1995 (Cth)
FATF	Financial Transaction Task Force
FTR Act	*Financial Transaction Reports Act 1988*
Gibbs Report	Sir Harry Gibbs, *Review of Commonwealth Criminal Law, Fifth Interim Report*, June 1991
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	*International Covenant on Civil and Political Rights*
IGIS	Inspector General of Intelligence and Security
Law Council	Law Council of Australia
Migration Act	*Migration Act 1958*
NAVA	National Association for the Visual Arts
NTEU	National Tertiary Education Union
OPC	Office of the Privacy Commissioner
PIAC	Public Interest Advocacy Centre
PJCAAD	Parliamentary Joint committee on ASIO, ASIS and DSD
PolMin	Australian Political Ministry Network
Privacy Act	*Privacy Act 1988*
SBS	Special Broadcasting Service Corporation
UK	United Kingdom
US	United States

CHAPTER 1

INTRODUCTION

Background

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

1.2 The Bill proposes to amend various federal laws with the stated aim of improving existing offences and powers targeting terrorist acts and terrorist organisations.

Conduct of the inquiry

1.3 The committee advertised the inquiry in *The Australian* newspaper on 5 November 2005, and invited submissions by 11 November 2005. Details of the inquiry, the Bill, and associated documents were placed on the committee's website. The committee also wrote to nearly 130 organisations and individuals.

1.4 The committee received 294 submissions, as well as a number of supplementary submissions, which are all listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public.

1.5 The committee held public hearings in Sydney on Monday 14, Thursday 17 and Friday 18 November 2005. A list of witnesses who appeared at the hearing is at Appendix 2 and copies of the Hansard transcript are available through the Internet at http://aph.gov.au/hansard.

Acknowledgement

1.6 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings, particularly in light of the short timeframes involved.

Scope of the report

1.7 Chapter 2 provides a background and overview of the Bill. Chapter 3 considers key provisions of the regime for Commonwealth preventative detention orders. Chapter 4 examines Schedule 4 of the Bill, which seeks to introduce a regime of 'control orders' to authorise the overt close monitoring of terrorist suspects. Chapter 5 considers the provisions of the Bill relating to sedition (Schedule 7); and advocacy of terrorism (Schedule 1).

1.8 Chapter 6 looks at the extension of police powers to stop, question and search persons in relation to terrorist acts; and to seize items related to terrorism and other

serious offences (Schedule 5); the introduction of powers to permit police to directly issue a notice to produce information and documents from persons and organisations for the purposes of investigating terrorism and other serious offences (Schedule 6); and the expansion of the scope of the powers of the Australian Security Intelligence Organisation (ASIO) (Schedule 10).

1.9 Finally, chapter 7 examines the proposed amendments to the *Financial Transaction Reports Act 1988* (FTR Act) and related legislation (Schedule 9); and proposed amendments to expand existing terrorism financing offences (Schedule 3).

1.10 The Appendices to the report list, among other things, answers provided by the Attorney-General's Department, the Australian Federal Police and the Australian Intelligence and Security Organisation to questions on notice asked at the hearings on 17 and 18 November 2005.

Note on references

1.11 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

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.

CHAPTER 3

PREVENTATIVE DETENTION

Introduction

3.1 This chapter will outline the proposed regime for Commonwealth preventative detention orders and discuss the issues and concern raised during the inquiry in respect of that regime.

Outline of the preventative detention regime

3.2 Item 24 of Schedule 4 amends the Criminal Code to insert new Division 105. The new Division provides for a regime of preventative detention for up to 48 hours for the purpose of preventing an imminent terrorist act occurring and to prevent the destruction of evidence relating to a terrorist act.[1] These objectives are stated in proposed section 105.1 and reflected in the new subsections 105.4 (4) and (6). The latter subsections provide the grounds for two distinct types of detention: detention *before* a terrorist act occurs in order to prevent an act of terrorism; and detention *after* an act of terrorism occurs to preserve evidence.

3.3 The scheme provides that AFP members may apply for either type of preventative detention order.[2] The AFP member applying for an order must set out the facts and grounds upon which the application is based. The information must be sworn or affirmed if the application is for a continued preventative detention order.

3.4 Members of the AFP of the rank of superintendent or above may grant and extend *initial preventative detention* orders for a period up to 24 hours.[3]

3.5 A *continued preventative detention order* may be granted by a serving Federal Judge or Magistrate, a retired judge of a superior court, the President or Deputy President of the AAT in respect of a person already detained under an initial preventative detention.[4] A continuing preventative detention order may be granted, extended and further extended to bring the total period of continuous preventative detention to a maximum of 48 hours.[5] An order cannot be applied for or made for a person under the age of 16 years.[6]

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1 *Explanatory Memorandum* p. 36

2 Proposed section 105.4.

3 Proposed para. 100.1(1)(a), sections 105.8 and 105.10.

4 Proposed para..100.1(1)(b) and s. 105.12.

5 Proposed sections 105.12 and 105.14.

6 Proposed section 105.5.

3.6 To make or extend preventative detention orders to *prevent an imminent terrorist act*, the issuing authorities must be satisfied on the basis of information provided by the AFP that there are reasonable grounds to suspect that the person:

- will engage in a terrorist act; or
- possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or
- has done an act in preparation for, or planning, of a terrorist act.[7]

3.7 The issuing authority must also be satisfied that:

- the order would substantially assist in preventing an imminent terrorist act;[8]
- detaining the person for the period for which the person is to be detained under the order is reasonably necessary to achieve that purpose;[9] and
- the terrorist act is imminent and expected to occur within the next 14 days.[10]

3.8 Proposed subsection 105.4 (6) provides that a preventative detention order can also be made where the issuing authority is satisfied that:

- a terrorist act has occurred within the preceding 28 days; and
- it is necessary to detain the person to preserve evidence of or relating to the terrorist act; and
- detaining the subject for the specified period is reasonably necessary to preserve evidence of or relating to the terrorist act.

3.9 The person detained must be given a copy of the initial order and a summary of the grounds, excluding information which is 'likely to prejudice national security' (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004)*.[11] The effect of an initial preventative detention order must be explained to the detainee, as soon as practicable, after the person has been taken into custody.[12] This obligation includes a requirement to inform the person of their right to seek a remedy in a federal court and their right to complain to the Commonwealth Ombudsman under the *Complaints (Australian Federal Police) Act 1981* or to an equivalent State or Territory body.[13]

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7 Proposed subsection 105.4(4).

8 Proposed para. 105.4(4)(b).

9 Proposed para. 105.4(4)(c).

10 Proposed subsection 105.4(5).

11 Proposed section 105.32.

12 Proposed section 105.28.

13 Proposed paras. 105.28(2)(e), (f) and (g).

3.10 A detainee may be held in police custody or at a prison or remand centre of a State or Territory during the period of the preventative detention order.[14] Proposed section 105.33 requires that a person taken into custody or detained under a preventative detention order must be treated with humanity, with respect for human dignity and must not be subjected to cruel, inhuman or degrading treatment.

3.11 Police interrogation of the detainee is prohibited except to: confirm the detainee's identity; ensure the detainee's safety and well being; or otherwise to allow the police to carry out their obligations under the Division.[15] However, it is apparent that preventative detention orders can operate in conjunction with:

- ASIO's compulsory questioning and detention powers under the Division 3 of Part III of the ASIO Act; and
- police investigation and questioning related to suspected criminal offences, including questioning governed by Part 1AA and Part IC of the Crimes Act.[16]

3.12 Proposed section 105.34 restricts a detainee's ability to contact other people. It provides that a detainee is prevented from contacting anyone, except where permitted by the Bill. The proposed section permits a detainee to have contact with certain classes of people by telephone, fax or email but 'solely' for the purpose of letting those persons know the detainee is *'safe but is not able to be contacted for the time being*'.

3.13 Special contact rules apply to a detainee who is under 18 years old or who are considered incapable of managing their affairs. These allow the detainees to disclose: the fact of the detention order; that the person is being held subject to the order; and the period of detention. A detained minor is entitled to a minimum of 2 hours contact with a parent, guardian etc per day or longer at the discretion of the AFP or as specified in the order. Contact may be made by visit as well as by telephone, fax or email.[17]

3.14 Proposed section 105.41 makes it an offence for a detainee to make an unauthorised disclosure. It also criminalises secondary disclosures by a person who has been contacted by the detainee (such as a lawyer or a family member or guardian of a person under 18 years).[18] The offence provisions also apply to interpreters and police officers who have assisted in the monitoring of contact with the detainee (see below).[19] The offences apply while the person is being detained under the preventative detention order and attract a maximum of five years imprisonment.

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14 Proposed section 105.27.

15 Proposed section 105.42.

16 See proposed sections 105.25 and 105.26, which refer to the provisions of the ASIO Act and the Crimes Act.

17 Proposed section 105.39.

18 Proposed subsections 105.41(1), (2), (3) and (6).

19 Proposed subsections 105.41(5) and (7).

3.15 The right to contact with other people is also subject to the discretion of the issuing authority. The issuing authority may issue a prohibited contact order to prevent communication by the detainee with another person where the issuing authority is satisfied that the exclusion *'would assist in achieving the objectives of the preventative detention order*'.[20]

3.16 A prohibited contact order may be applied to a particular lawyer.[21] However, in those circumstances, or where a person is unable to contact a lawyer of their choice, there is an obligation to provide reasonable assistance to the person to identify and contact another lawyer for the purpose of providing advice about rights in relation to a preventative detention order.[22] Proposed section 105.37 imposes restrictions on the scope of legal advice and representation that may be provided by a lawyer to the person while the person is in custody.

3.17 Proposed section 105.38 requires that all communication between the detainee and other people must done is such a way that the meaning and content of the communication can be subject to monitoring. The requirement to monitor communications includes, among others, all communications between the detainee and their lawyer.[23]

3.18 A senior AFP member, who is not involved in the making of the preventative detention order, must be nominated to oversee the exercise of powers and performance of obligations in relation to the preventative detention order.[24] It is the duty of this senior member to receive and consider representations from the detainee, their lawyer, parent, guardian or another person representing the detainee's interests.[25] Representations may be made in relation to the exercise of any powers or obligation, including the revocation of the preventative detention order and prohibited contact orders and the treatment of the person while in detention.[26]

3.19 A preventative detention order must be revoked on the application of the AFP, where the grounds on which the order was made cease to exist. As noted above, the detainee, their lawyer or other person representing their interests may make representations to nominated senior AFP member for revocation of the order.[27]

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20 Proposed sections 105.15 and s.105.16.

21 Proposed section 105.40.

22 Proposed subsection 105.37(3).

23 Proposed subsection 105.38(5).

24 Proposed subsections 105.19(5), (6) and (7).

25 Proposed subection 105.19(8).

26 Proposed section paras. 105.19(8)(d), (e) and (f).

27 Proposed section 105.17.

3.20 The Bill recognises the general right of detainees to access a court for a remedy in relation to a preventative detention order or their treatment while held in detention. The right to make an application to a federal court may be made at any time and a person must be informed of their right to do so.[28] However, proposed subsection 105.51(4) excludes the application of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) to any decision made under Division 105.

3.21 The Bill provides detainees with a right to apply to the Security Appeals Division of the Administrative Appeals Tribunal for merits review of a decision to issue, extend or further extend an initial or continued Commonwealth preventative detention order.[29] The Tribunal may declare the order void and order compensation.[30] The application for review cannot be made while the order is in force.[31] Proposed subsection 105.51(9) provides that the *Administrative Appeals Tribunal Act 1975* (AAT Act) will apply to an application to the AAT to review**,** subject to any modifications specified in regulations to be made under that Act.

3.22 A State or Territory Court has no jurisdiction in proceedings for a remedy in relation to a Commonwealth preventative detention order or treatment of the person detained under a Commonwealth order while the order is in force.[32] If the person is also detained under a State order and brings proceedings for review of that order in a State or Territory Court, that court may review the Commonwealth order on the same grounds and grant the same remedies available under State or Territory law that would apply to the review of the State order.[33] Proposed subsections 105.52(3) and (4) provides that a State or Territory Court may order the AFP Commissioner to give the court and parties to the proceedings the information that was put before the person who issued the Commonwealth order - subject to the requirements of the *National Security Information (Criminal and Civil Proceedings) Act 2004.*

Comparison with overseas laws

3.23 The committee understands that the Bill's provisions were modelled in part on the counter terrorism laws enacted in the United Kingdom (UK). The following section summarises some of the key UK provisions as well as relevant Canadian law

Contrast with the Terrorism Act 2000 (UK).

3.24 The *Terrorism Act 2000* (UK) provides for arrest without warrant of a person reasonably suspected of being a 'terrorist' in the context of a terrorist investigation. A

28 Proposed subsections 105.51(1) and para. 105.28(2)(g).

29 Proposed subsection 105.51(5).

30 Proposed subsection105.51(8).

31 Proposed subsection 105.51(5).

32 Proposed subsection 105.51(2).

33 Proposed section 105.52.

'terrorist' is defined by that Act as a person who has committed certain offences or is or has been concerned in the commission, preparation or instigation of acts of terrorism.[34]

3.25 It does not require reasonable suspicion of a specific criminal offence and may not necessarily result in a charge. However, the UK detention regime is not preventative detention *per se*, but is better described as pre-charge detention which is explicitly linked to the investigation of terrorist offences.

Police review (within 48 hours)

3.26 The police may detain terror suspects for up to 48 hours from the time of their arrest. The detention is subject to review by a reviewing officer, who is a senior police officer not involved in the investigation. An initial review must be conducted by an inspector as soon as practicable after arrest and at 12 hourly intervals. After 24 hours, the review must be conducted by a superintendent.[35] Before authorising a person's continued detention, a review officer must give the detained person or their solicitor an opportunity to make representations – either orally or in writing.[36]

3.27 Continued detention may be authorised by the reviewing officer only if the review officer is satisfied that it is necessary to: obtain relevant evidence whether by questioning him or otherwise; preserve relevant evidence; detain pending the making of a deportation notice by the Home Secretary; or detain pending a decision whether or not to charge the person. A review officer is subject to a duty not to authorise continued detention for the purpose of obtaining or preserving evidence, unless he is satisfied the investigation is being conducted diligently and expeditiously.[37]

Inter partes hearing to extend detention beyond 48 hours

3.28 The UK legislation provides that a warrant to extend the detention for 7 days may be sought from a judicial authority. The period of detention without charge was increased to 14 days in January 2004.[38] The grounds for extension are limited to the purpose of obtaining or preserving evidence relating to that person's commission of an offence. The judicial authority must be satisfied there are reasonable grounds for believing the further detention of the person is necessary to:

- obtain relevant evidence whether by questioning him or otherwise: or

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34 *Terrorism Act 2000* (UK), s. 40, s.41.

35 *Terrorism Act 2000* (UK), schedule 8, s.24.

36 *Terrorism Act 2000* (UK), schedule 8, s.26. A review officer may refuse to hear oral representations from the detainee if he considers that he is unfit to make representations because of his condition or behaviour.

37 *Terrorism Act 2000* (UK), schedule 8, s.22.

38 An amendment inserted by the *Criminal Justice Act 2003* increased the total possible period of detention without charge to 14 days from the time of arrest or detention. The amendment came into force on 20 January 2004.

- preserve relevant evidence; and
- the investigation is being conducted diligently and expeditiously.[39]

'Relevant evidence' means evidence relevant to a specific office or indicating he is a person that is or has been concerned in the commission, preparation or instigation of acts of terrorism.

3.29 An application for a warrant to extend the detention may not be heard unless the person has been given notice of:

- the fact that the application has been made;
- the time it was made; and
- the time at which it is to be heard and grounds upon which further detention is sought.[40]

3.30 The detainee must be given an opportunity to make oral or written submissions to the judicial authority. The detainee has a right to representation. A hearing may also be adjourned to enable the person to obtain legal representation. However, there is no absolute right of appearance and the judicial authority can exclude both the detainee and his representative.

Contrast with Canadian Criminal Code

3.31 The Canadian *Criminal Code* provides a preventative arrest power exercised by a judge. An exception is created for emergency circumstances in which a police officer can effect an arrest for a limited time and based on narrower criteria.[41] The person detained must be brought before a judge within 24 hours and an information laid before that judge. The use of preventative arrest power is regarded as exceptional and has never been exercised in the three reporting periods from December 2001 to December 2004.[42]

Key issues or concerns raised in respect of the Bill

3.32 Key concerns raised with the committee about the proposed preventative detention regime include the following:

- **The adequacy of the procedural safeguards**. Concerns were raised that the threshold for making, extending or further extending initial and continued preventative detention orders is lower that that which applies to the arrest or detention of criminal suspects. Moreover, the Bill allows detention for the purpose of preserving evidence in the 28 days following a terrorist act without

39 *Terrorism Act 2000* (UK), schedule 8, s.32.

40 *Terrorism Act 2000* (UK), schedule 8, s.29, s.31.

41 *Criminal Code* (Canada), ss. 83.3(4) to (6).

42 Dr Carne, *Submission 8*, p. 15.

the necessity to establish any connection between the subject of the order and any terrorist related activity. Other concerns included: empowering police to take non-suspects into custody and detain them for 24 hours without prior judicial authorisation; the lack of an *inter partes* hearing at any stage when orders are authorised; and the lack of an opportunity to test police information. The lack of any mechanism to address the adverse impact of procedural unfairness was also a concern.

- **Access to the courts**: Concerns here included: detainees' lack of a right to be provided with detailed reasons and with the factual material upon which the order is based and which impedes access to a federal court for judicial review (due to limited information on which to base an appeal); decisions made under the proposed Division 105 being excluded from the ADJR Act; and the bar on access to the AAT and a State or Territory Court while a Commonwealth order remains in force.
- **Conditions of detention and standards of treatment**: A key concern here was the prohibition on police interrogation and the interaction of a preventative detention order with the compulsory questioning and detention regime under the ASIO Act. Another concern was the lack of an external ongoing oversight of the implementation of the preventative detention regime. The conditions governing detention of minors were also raised as a concern.
- **The broad discretion to prohibit contact with the outside world**. That is, the wide discretion available to the AFP and issuing authorities to prohibit contact with the outside world; detainees being prohibited from disclosing the fact of the preventative detention, the period of detention or their whereabouts except in strictly limited circumstances as well as the imposition of criminal liability for unauthorised contact with the outside world.
- **Lawyer/Client relationship:** Concerns here included: the restrictions imposed on detainees' lawyers and their discussions with their client during detention; the blanket authorisation to monitor and record all communications between a detainee and his or her lawyer; and scope to use otherwise privileged information and conversations in subsequent proceedings or investigations.

Effectiveness of procedural safeguards

3.33 It is apparent from submissions received by the committee that Division 105 of the Bill raises significant concerns with respect to the presumption of innocence, freedom from unlawful and arbitrary detention and the right to fair trial. Numerous submissions and witnesses argued that the procedures for Commonwealth orders envisaged by the Bill are not a sufficient protection against unjustified infringement on these fundamental principles. These arguments are based on constitutional, common law and international law grounds. The values of Australian democracy were also cited. The Law Council, for example, opposed both preventative detention and control order as the creation of a 'de facto new criminal law system'. Its President, Mr John North, advised the committee that:

> Australia's formal criminal justice system embraces critically important guarantees and safeguards, including the right of an accused to a fair trial, rules of evidence which are fair, the presumption of innocence and the requirement that guilt be established beyond reasonable doubt. These safeguards and minimum guarantees have been in place for centuries to try and punish those who can be convicted beyond reasonable doubt. It is unheard of in Australian law to have people held or detained for long periods under very strict conditions unless we follow these legal safeguards.[43]

3.34 Similarly, the ACT Human Rights Commissioner said:

> Preventative detention without charge or trial is inherently problematic in respecting the human rights of individuals given the fundamental significance of the right to liberty in a democracy. It should only be used in the most exceptional circumstances and in strict accordance with the principles of international human rights law. General Comments of the Human Rights Committee, which monitors compliance with the ICCPR, have clarified that use of preventive detention for public security reasons must still comply with the right to liberty in article 9; it must not be arbitrary, it must be based on grounds and procedures established by law (that is, sufficiently circumscribed by law and specifically authorised), information on the reasons must be given, and court control of the detention must be available.[44]

3.35 HREOC echoed the same view. Its President, Mr John Van Doussa QC, stressed that, if preventative detention is to be adopted on national security grounds, it must be according to law, must not be arbitrary (in the sense of being unjust, unreasonable or disproportionate, taking into account the facts of each case) and must represent the least restrictive means of achieving the purpose.[45] HREOC maintained that the issuing, extension, and revocation of a preventative detention order are all a determination of the rights and obligations of the individual and, as such, the right to a fair trial in this context requires procedural equality. This includes an effective opportunity to contest the information upon which an order is based.[46]

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43 Mr John North, *Committee Hansard,* 14 November 2005, p. 77.

44 Dr Helen Watchirs, ACT Discrimination and Human Rights Commissioner, *Submission 154*, p. 5. See also the Council of Europe Guidelines on Human Rights and the Fight Against Terrorism, adopted by the 45 member states. The UK Joint Committee on Human Rights considered it the appropriate framework within which to debate counter terrorism responses.

45 HREOC, *Submission 158*, p. 8; Article 9 of the ICCPR.

46 HREOC, Submission *158*, p. 13; Article 14.1 of the ICCPR.

Thresholds

3.36 The threshold for preventative detention orders to prevent a terrorist act was criticised as vague and overly broad.[47] The threshold of reasonable grounds to *suspect* is a lower than the test of *'reasonable belief'* required by police to arrest a person.[48] It is also lower than the threshold required at the committal stage of a criminal proceeding. While this is in keeping with the preventative purpose of the scheme, there is concern that only the most minimal disclosure of information to an issuing authority is required to meet the test.

3.37 Witnesses also criticised the threshold for the issuing of preventative detention orders for the purpose of preserving evidence. It was noted that proposed subsection 105.4(6) permits an application to be made for a preventative detention order even against persons who are not expected to engage in terrorist acts or who possess a thing connected with its preparation. The issuing authority only needs to be satisfied that:

- a terrorist act has occurred within the last 28 days; and
- it is necessary to detain the subject to preserve evidence of, or relating to a terrorist act; and
- detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the above-mentioned purpose.

3.38 In this regard, proposed subsection 105(6) appears significantly different to provisions which permit pre-charge detention under the UK's terrorism legislation (described above).

3.39 Proposed subsection 105.4(6) was criticised for being drafted so broadly that any person may be subject to an order whether or not he or she has any involvement with or connection in the act or people involved in the act itself.[49] Dr Carne argued, for example, that:

> The breadth 105.4(6)) is striking… This provision is drafted so broadly that any innocent person at the site or within proximity to a terrorist act – i.e. an innocent bystander, victim or person in the wrong place at the wrong time – could be subject to a preventative detention order on the grounds of evidence preservation with some nexus or connection – which need not be direct, immediate or specific – to the terrorist act. In relation to forensic

47 Proposed subsection 104.4(4); Dr Carne, *Submission 8*, p. 13; Dr Mathew, *Submission 187*, p. 4; Dr Helen Watchirs, ACT Discrimination and Human Rights Commissioner, *Submission 154*, p. 4.

48 *Crimes Act 1914,*s.3W; suspicion does not imply that it is well founded or that the facts are or must be correct - see *Tucs v Manley* (1985) 62 CALR 460; *George v Rockett* (1990) 170 CLR 104 at 117.

49 *Committee Hansard*, 14 November 2005, pp.18 - 19.

> material, this section potentially applies detention to hundreds of innocent people.[50]

3.40 The Australian Broadcasting Corporation (ABC) argued that this provision is of particular concern because it does not contain the kind of safeguards against detention that are contained in equivalent or analogous legislation, such as the ASIO Act (which requires a warrant approved by an independent authority). The ABC noted that:

> While it is hoped that the power would not be used in such a way, there is nothing, it would seem, to prevent a journalist or other media personnel (such as producers, researchers, editors, camerapersons and sound recordists) from being detained in order to preserve evidence relating to a terrorist act. It would be open, therefore, for the AFP, without further authority, to detain media personnel on the basis of a judgement that it is necessary to ensure that a recording or transcript of an interview, for example, is preserved.

3.41 The committee notes that AFP Commissioner has explained that a primary purpose of preventative detention orders in the context of a bombing is to enable police to detain people who are at or near the site of the attack.[51] In response to questioning, the Department acknowledged that, if necessary, a preventative detention order could be sought for that purpose. However, the Department argued that it is unlikely that an order to preserve evidence would be applied to people who are mere witnesses to an event or, for example, a journalist who acquires certain materials, when that evidence can easily be obtained and without the use of coercion.[52]

3.42 The ABC argued that, rather than ensuring such evidence is preserved, the fear of possible detention is likely to encourage media personnel to divest themselves of such material before any preventative detention order can be made:

> As with the notice to produce provisions, it is of concern that no protection is afforded to information or material that may be the subject of legal professional privilege nor journalists' obligations to protect the identity of confidential sources.[53]

3.43 The Media, Entertainment and Arts Alliance expressed similar concern. It argued that the lack of protection in subsection 105.4(6) against requests for information will lead to demands for journalists to identify sources, turn over notes and documents received in confidence.[54] This, it argued, would conflict with their professional responsibilities, ethics and values.

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50 *Submission 8*, p.7.

51 Interview with Commissioner Mick Keelty, *Lateline*, ABC, 31 October 2005.

52 *Committee Hansard*, 14 November 2005, p. 19.

53 *Submission 196*, p. 2.

54 Wolpe Bruce, Fairfax Corporate Affairs Director, *The Australian*, 10 November 2005 referred to in *Submission 196*, pp 1-2.

3.44 In response to the above, the Committee notes that, in respect of both types of preventative detention orders, the Bill requires that the issuing authority be satisfied that the order is 'reasonably necessary' for the purpose for which it is sought[55] Dr Mathew generally welcomes this move, but argued that the key issue is whether the facts of the individual case justify the period of detention.[56]

3.45 HREOC also welcomed the introduction of an element of proportionality assessment but expressed concern that the current formula does not fully express the proportionality test. HREOC has recommended that proposed subsections 105.4(4) and (6) be amended to also require the issuing authority to be satisfied that the purpose for which the order is made cannot be achieved by a less restrictive means. This would make explicit the requirement to assess the proportionality of the restriction on liberty to achieve the purpose of preventing an imminent terrorist act occurring or to preserve evidence.[57]

Initial preventative detention orders

3.46 Particular concerns were expressed about the reliance on a senior AFP member to issue an initial order for preventative detention on the unsworn/unaffirmed application of a more junior AFP member. Dr Carne, for example, criticised this aspect of process for its failure to ensure independence and rigorous scrutiny.[58] Professors Charlesworth and Byrne also raised concerns about the potential for abuse and the 'clear apprehension of bias' where both the authority to apply and the power to issue a preventative detention order are vested in the same law enforcement agency.[59]

3.47 The Lauterpacht Centre for International Law argued that the Bill's reliance on a senior AFP member to issue an initial preventative detention order is an insufficient safeguard against arbitrary detention:

> While the order is limited in time to 24 hours, it still involves a substantial restriction on the right to liberty, and in the circumstances should involve a judge.[60]

3.48 This view was shared by Dr Watchirs, the ACT Human Rights Commissioner, who maintained that all preventative detention orders should be issued by an independent judicial officer.[61]

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55 Proposed para.104.4(4)(c).

56 Dr Mathew, *Submission 187*, pp. 4, 9; *A v Australia* UN Doc CCPR/C/59/D/560/1993.

57 HREOC, *Submission 158*, p. 3.

58 Dr Carne, *Submission 8*, p. 14.

59 Professor Charlesworth, Professor Byrne, Ms Mackinnon, *Submission 206*, pp 2, 6 and 7.

60 *Submission* 240, p. 5. The Cambridge based centre maintained that the exigencies of dealing with terrorism cannot justify arbitrary detention. In doing so, it cited the European Convention on Human Rights as applied in *Fox, Campbell & Hartley v UK* (1990) ECHR Application No. 12244/86 at 32.

3.49 Other witnesses and submitters were prepared for senior AFP officers to issue such orders, albeit in more limited circumstances. Dr Carne, for example, argued that:

> The issuing authority of a senior AFP member should be strictly confined to limited, exceptional, emergency circumstances, subject to review at the earliest possible opportunity by a Magistrate or judicial issuing authority.[62]

3.50 HREOC had a similar view. It argued that while an *ex parte* order may be warranted in some special circumstances where there are legitimate grounds for urgency, this should not be the norm.[63]

3.51 In this regard, the committee notes recent media comment that doubling of the size of ASIO over the next five years (with an influx of new staff and the consequential need to develop skills) increases the risk of a lack of objectivity and errors in identification.[64] The committee also note media reports about a civil proceedings being commenced against the Commonwealth in the NSW District Court following a reported mistaken raid by ASIO and the AFP on a Melbourne home in 2001.[65]

3.52 The committee also notes that differing approaches appear to have been taken on this issue at the State level. South Australia's proposed complementary legislation, for example, provides that a senior police officer may only authorise detention up to a maximum period of 24 hours if there is an urgent need to do so, and it is not reasonably practicable in the circumstances to have the application dealt with by a judge.[66] The committee understands that the proposed New South Wales legislation does not provide an equivalent power. Rather, interim (or urgent) preventative detention orders are to be issued by the New South Wales Supreme Court.[67]

Continued preventative detention order

3.53 Proposed section 105.2 provides that the Minister may appoint the following as an issuing authority for continued preventative detention orders:

- a serving judge of a State or Territory Supreme Court;
- a serving Federal Judge or Magistrate;
- a person who is a retired judge of a superior court with five years service;

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61 *Submission 154*, p. 4.

62 Dr. Carne, *Submission 8*, p. 14.

63 HREOC, *Submission 158*, p. 13; *Committee Hansard*, 17 November 2005, p.82.

64 Hogg B., 'Democracy muted by fear', *Canberra Times*, 20 October 2005, p.70.

65 Allard T., 'Read all about this ASIO bungle. Soon it'll be a crime', *Sydney Morning Herald,* 28 October, 2005, p. 1.

66 Terrorism (Preventative Detention) Bill 2005 (SA), s. 4 and s. 6.

67 Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005 (NSW), s. 26H.

- the President and Deputy President of the AAT.

3.54 An issuing authority exercises their power in a personal capacity. The Bill casts the process as an exercise of non-judicial power - an administrative process conducted *ex parte*. That is, without the interested parties present and therefore without the opportunity to test the information laid by the police. The constitutional issues arising from this aspect of the Bill are canvassed briefly in Chapter 2.

3.55 The involvement of serving and retired judicial officers injects a degree of impartiality and scrutiny into the preventative detention regime. However, many witnesses still regard the procedures as inadequate. Critics argued that:

- the issue of orders which intrude extensively on personal liberty should depend on a judicial determination based on evidence, rather than on untested information by law enforcement agencies;[68] and
- reliance on the AAT President and Deputy President may lack the required criminal justice expertise.[69]

3.56 Proposed section 105.11 requires the application for a continued preventative detention order to set out, among other things, the facts and grounds on which the AFP member considers the order should be made. The process is a fresh application and there is no requirement to set out the facts and grounds that were relied for the initial preventative detention order. It is therefore possible that the continued preventative detention order may be made on entirely different grounds.

3.57 Dr Carne argued that the Bill's requirement that the issuing authority consider afresh the merits of making the order is not a form of judicial review:

> There is no capacity for the issuing authority to have representations made, hear evidence, submission or cross examination from the subject of the … order or representative of that person … This omission is oddly inconsistent with the capacity of a person detained ... or their lawyer being able to make representations to the nominated senior AFP member during the course of (but not limited to) an initial … order, which has been issued by a senior AFP officer.[70]

3.58 Dr Carne also drew the committee's attention to the possibility of a conflict of interest arising if a person appointed as an issuing authority under proposed section 105.12 were also to be appointed as a Prescribed Authority under the ASIO Act. Section 34B of that Act provides that a retired judge of a superior court, a serving judge of a State or Territory Supreme Court and the President or Deputy President of the AAT may be appointed in their personal capacity as a Prescribed Authority

68 PIAC, *Submission 142*, p. 33; Mr Beckett, *Committee Hansard*, 14 November 2005, p. 46.

69 Law Council of Australia, *Committee Hansard*, 14 November 2005, p. 81.

70 Dr Carne, *Submission 8*, p.17.

responsible for supervising the questioning by ASIO officials under a compulsory questioning or questioning and detention warrant (see below).[71]

3.59 The Casten Centre for Human Rights proposed that, if preventative detention is to be introduced in Australia, it be dealt with as a matter of State law. The Centre argued that this would: overcome the constitutional complexities; allow serving Judges to exercise the function of authorising orders; and provide greater scope for procedural fairness at the issuing stage and a wider basis for subsequent review of orders.[72]

Rules of evidence

3.60 An important difference of opinion emerged during the hearings at to whether the *Evidence Act 1995* (Cth) (the Evidence Act) will apply to procedures envisaged by the Bill, including the issuing procedure for a preventative detention order. The Department subsequently clarified that applications for preventative detention orders, including applications for extensions of order, are not proceedings before a court and therefore the Evidence Act will not apply. As such, all the material that supports the application can be properly placed before the issuing authority – not just the material that would be admissible under that Act.[73]

3.61 Many witnesses expressed concern about the reliability of information on which an application for, or a decision to issue, such an order might be based. For example, Mr Zagor expressed concern about the possible use of unreliable evidence, including hearsay and false accusation, which may result in severe restrictions on civil liberties, which cannot be effectively tested or challenged in Court.[74] Other witnesses noted the need to also prohibit expressly the use of information obtained through torture. Dr Watchirs, for example, noted that the Council of Europe *Guidelines on Human Rights and the Fight Against Terrorism* specify that national counterterrorism measures must respect the basic principles of a fair trial, be subject to proper judicial supervision, and must not use information or intelligence that is the product of torture.[75]

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71 Section 34D of the ASIO Act permits the issuing of a compulsory questioning or questioning and detention warrant where the issuing authority is satisfied there are reasonable grounds for believing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.

72 Professor Joseph and Mr Abraham, Castan Centre for Human Rights, *Submission 114*, p. 15.

73 *Submission 290a*, Attachment A, p. 12. See also *L v Lyons* (2002) 137 ACrimR 93. The same is true for procedures governing the issue of a control order.

74 Mr Zagor, *Submission 260*, p. 10.

75 Dr Watchirs, *Submission 154*, p. 5.

A Public Interest Monitor

3.62 The Bill currently recognises the role of the Public Interest Monitor (PIM) in relation to proceedings to confirm a control order where the order has been made in Queensland or the person is resident in Queensland.[76] The Queensland Law Society proposed that if *ex parte* hearings for issuing a preventative detention orders are retained, provision should be made for a PIM to be present at the hearing.[77] In a similar vein, HREOC asked the committee to consider the value of a PIM or a Special Advocate (see below).

3.63 The Queensland PIM is a statutory appointment under the *Police Powers and Responsibility Act 2000 and Crime and Misconduct Act 2001*(Qld). Although independent, the office is appointed by the executive rather than the court. The role of the PIM is to monitor compliance by police officers with the laws concerning applications for surveillance warrants and covert search warrants and to appear at hearings to test the validity of such applications. The PIM or a lawyer representing the PIM may be present at the hearings.[78] It is understood that the role of the PIM includes:

- examination and cross examination of any witnesses;
- making submissions on the appropriateness of granting the application; and
- to gather statistical information about the use and effectiveness of warrants.

3.64 The Queensland PIM may at any time give the Police Commissioner a report on non-compliance and must provide an annual report to the Minister on the use of warrants.[79] The PIM's establishment was intended to safeguard the interests of the individual by ensuring that warrants comply with legal requirements.

3.65 The PIM does not have a statutory responsibility to represent the interests of the particular individual who is the subject of any warrant.[80] This in contrast to the role of the Special Advocate in the UK, which evolved in response to the particular problems of dealing with national security information in security sensitive proceedings.

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76 Proposed para. 104.14(1)(e).

77 Queensland Law Society, *Submission 222*, p. 4.

78 *Police Powers and Responsibilities Act 2000* (Qld), s.149: HREOC, *Submission* 158, p. 39.

79 *Police Powers and Responsibility Act 2000* (Qld), s. 159; *Crime and Misconduct Act 2001* (Qld), s. 326.

80 HREOC, *Submission 158*, p. 39.

Special Advocate

3.66 Witnesses and submitters recommended that provision should be made in the Bill for a court appointed and security cleared Special Advocate.[81]

3.67 The concept of a Special Advocate was examined exhaustively by the Australian Law Reform Commission in its 2004 report *Keeping Secrets: The Protection of Classified and Security Sensitive Information*.[82] In summary, a Special Advocate is an independent counsel from the independent bar appointed by the Court on an ongoing basis. The idea derives from the Special Immigration Appeals committee and the Proscribed Organisations Appeal Committee in the UK and is similar to counsel assisting a Royal Commission.[83] The role of the Special Advocate is to provide assistance to the issuing authority by: testing the intelligence and police information; scrutinising all the information and documentation which supports the application for a preventative detention order; and examining and cross examining witnesses. The Special Advocate has a statutory responsibility to represent the interests of the person to be subject to the order, but this role is in addition to any rights to legal representation that the person may have.[84]

3.68 The benefit of a Special Advocate was acknowledged by the UK Court of Appeal in a recent decision concerning the detention of a man under UK terrorism laws on evidence that the court considered 'was wholly unreliable and should not have been used to justify detention'.[85]

Judicial and merits review

Right to Reasons

3.69 Particular concerns were raised about detainees' lack of a statutory right to be provided with the reasons why the initial or continued preventative detention order was granted.[86]. As noted above, proposed section 105.28 requires that the effect of the

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81 HREOC, *Submission 158*, p. 16; Dr Carne, *Submission 8*, p. 9; Mr Zagor, *Submission 260*, p. 10.

82 ALRC, *Keeping Secrets: The protection of classified and security sensitive information*, (ALRC, Report No. 98). The report is available online at http://www.austlii.edu.au/au/other/alrc/publicatons/report/98.

83 Dr Carne, Submission *8*, p. 9.

84 Dr Carne, *Submission 8*, p. 9.

85 *The Secretary of State for the Home Department and M* [2004] Civ 324 [13], cited in ALRC, *Keeping Secrets: The protection of classified and security sensitive information*, (ALRC, Report No. 98), paragraph 10.87.

86 The Bill provides that review under the ADJR Act is excluded and, therefore, a detainee cannot rely on section 13 of that Act to obtain reasons. Nor is there a right under the AAT Act to a statement of reasons for a decision subject to review by the Security Appeals Division (see subsection 28(1AAA) of that Act).

preventative detention order be explained to the detainee. Proposed section 105.32 also requires that the detainee be provided with a copy of the order and a summary of the grounds on which the order is based as soon as practicable after the person is first taken into custody. He or she may also request that a copy be sent to his or her lawyer (unless the lawyer is a prohibited contact).[87]

3.70 While these measures provide some access to relevant information, they were criticised as falling short of what is necessary to ensure the person knows the case against them and is able to contest the order. Witnesses and submissions pointed to the need to expand the obligation to provide a summary of grounds into a full right to reasons, subject to redactions or omissions on national security grounds. This extended to provision of the material upon which the order is based.[88] It was argued that the lack of such a right would impede a detainee's ability to challenge a preventative detention order in a federal court or in the AAT.[89] As the Administrative Review Council (ARC) stated:

> The opportunity for someone to seek administrative review of a decision is contingent to a large degree on the extent to which information about the reasons for the decision is available to that person…the requirement that decision makers give reasons for their decisions may be the single most important reform in the Commonwealth administrative review package of the 1970s.[90]

3.71 Mr Walker SC advised the committee that a full statement of reasons was critical to exercising the right to challenge an order. He argued that the current provisions provided no guarantee that the summarised information would in fact be the authentic grounds upon which the issuing authority has granted the order. This argument is set out in more detail in relation to control orders (see Chapter 4).

3.72 The ARC also argued that detainees should be provided with a full statement of reasons, not just a summary, albeit subject to any necessary exclusions of information on security grounds. However, it argued that further consideration should be given to who will make the decision that information is 'likely to prejudice national security' and should not be disclosed.[91] The ARC also noted that the copy of the order and the *reasons* for detention should be given to the detainee:

> …at the time they are taken into custody, and, if that is not possible, as soon as practicable thereafter. This seems particularly important in view of the short duration of the period of detention.[92]

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87 Proposed subsection 105.32(6).

88 *Committee Hansard*, 14 November 2005, p. 71.

89 See for example, Law Council, *Submission 140*, p.11; Gilbert and Tobin Centre for Public Law, *Submission 80*, p.12; Professors Charlesworth and Bryne, Ms Mackinnon, *Submission 206*, p.3.

90 Administrative Review Council, *Submission 263*, p. 8.

91 *Submission 263*, p.8.

92 *Submission 263*, p. 7.

3.73 Dr Watchirs also recommended that proposed section 105.32(6) be amended to provide an automatic notification of the terms of the order to the detainee's nominated legal representative.

Access to a court

3.74 The lack of an express statutory right to appeal a preventative detention order means that a detainee must rely on common law principles of judicial review and prerogative writs. Access to the original jurisdiction of the Federal Court and the High Court of Australia is guaranteed by s. 75 (v) of the *Commonwealth Constitution* and section 39(B) *Judiciary Act 1903* (Cth). There has been some uncertainty concerning the scope and efficacy of remedies available under the latter. The Explanatory Memorandum merely indicates that:

> It may be possible to seek injunctive relief to stop the detention in the equitable jurisdiction of the Federal Court.[93]

3.75 Australian Lawyers for Human Rights criticised the scope for judicial review as too limited. That is, a person can only apply to the Federal Court or High Court for a writ of *habeas corpus* to challenge the legality of detention or on narrow procedural grounds.[94] Similarly, HREOC argued that judicial review on narrow questions of law is not sufficient to provide a detainee with an effective remedy because it fails to provide a sufficiently broad basis to investigate and evaluate the facts.[95] Witnesses also drew attention to the fact that the *National Security Information (Criminal and Civil Proceedings) Act 2004* will apply, allowing the Attorney General to issue a certificate to exclude security sensitive information or particular witnesses from those proceedings where disclosure is likely to prejudice national security.

3.76 Many witnesses acknowledged that revisions to the Bill prior to introduction into the House of Representatives, have improved the individual's right of access to the court. Access to State and Territory courts and to the Security Appeals Division of the Administrative Appeals Tribunal for merit review are now included in the Bill. However, it is apparent that some still question the rationale for excluding access to the State and Territory Courts and the AAT until the Commonwealth order has expired. The Explanatory Memorandum provides no assistance in this regard.

3.77 The ARC observed that this is a new jurisdiction for the AAT, which presently has jurisdiction in relation to review of adverse and qualified security assessments under the ASIO Act. Procedures have been developed by the AAT specifically in relation to the execution of that particular jurisdiction. The ARC proposed that:

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93 *Explanatory Memorandum*, p. 70.

94 See para. 33(f) of the *Judiciary Act 1903* (Cth); Australian Lawyers for Human Rights; *Submission 139*, p. 17; see also article 2(3) ICCPR and *Keenan v United Kingdom* (2001) 33 EHRR 913 for international human rights law perspective referred to in *Submission 158,* p. 11.

95 HREOC, *Submission 158*, p. 12.

> Rather than giving the Tribunal the power to declare a decision in relation to the issue of an order 'void' (s.105.51 (70(a)), the Council considers that it would be preferable simply to provide for the Tribunal to 'set aside' the decision if it would have taken that course when the order was in force.[96]

The ARC suggested that this would be more in keeping with the Tribunal's administrative rather than judicial function.[97]

3.78 The ARC noted that the Bill proposes that the AAT's procedures will be modified as necessary by way of regulation to accommodate the new jurisdiction:

> The Council assumes that decisions of the Tribunal are excluded like all other decisions under Division 105, from judicial review under the ADJR Act but notes the provision for review under the AAT Act as a means of affording protection to individual rights.[98]

3.79 Some submissions also criticised the Bill for creating different remedies depending upon the type of order. Proposed section 105.51 provides that persons detained under a Commonwealth order can apply to the federal courts for a remedy at any time, but, if the person is subsequently detained under a State or Territory law (that is, under state preventative detention orders), review of the Commonwealth order is effectively denied access until the order has expired.[99]

Preventative Detention and Minors

3.80 Witnesses and submitters raised concerns about the application of preventative detention orders to persons under 18 years old. It was argued that preventative detention orders may breach article 37(b) of the Convention on the Rights of the Child (CRC), which requires that the detention of a minor should be a measure of last resort and for the shortest possible time.[100] It was also claimed that current provisions fail to reflect the obligation of an issuing authority under article 3 of the CRC to give consideration to the best interests of the young person who is the subject of such an application.[101]

3.81 Submissions expressed concern that detainees who are not charged with any criminal offence may be held in prisons and remand centres contrary to article 10 (2)(a) of the ICCPR. There is no express exception in the Bill to prevent young people under 18 being held with adult prisoners. Submission noted that doing so may

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96 *Submission 262*, p. 9.

97 *Submission 262*, p. 9. See also *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

98 Proposed subsection 105.51(7); *Submission 262*, p. 9.

99 Professor Charlesworth, Professor Byrnes, Ms Mackinnon, *Submission 206*, p. 3.

100 See, for example, The Hon Alastair Nicholson and others, *Submission 237*, p. 31.

101 *Submission 237*, p. 31.

breach of article 10(2)(b) of the ICCPR and article 37 of the CRC.[102] The committee notes that, in contrast to the Bill, the proposed complementary NSW legislation requires a detainee who is under 18 years to be held in a juvenile facility.[103]

3.82 As noted above, the Department advised the committee that the Bill had been thoroughly vetted by the Department's Office of International Law, which confirmed that the Bill is consistent with Australia's obligations under the CRC.[104] The Department also noted that the age of criminal responsibility applies generally from the age of 14 years and that there is a real possibility of young people under 18 years being involved in terrorist related activity.[105]

3.83 The committee notes that ASIO warrants may be sought in respect of a minor between the ages of 16 to 18 years where the Minister and the issuing authority are satisfied on reasonable grounds that it is likely that the person will commit, is committing or has committed a terrorism offence.[106]

3.84 The Department noted that the AFP rely on police cells to detain young people as well as adults for federal crimes and expressed a belief that detention under a Commonwealth order, which is for a maximum of 48 hours, will most likely be in police cells.[107] The Department assured the committee that there is a commitment to comply with, and have practice and policies consistent with, internationally accepted standards that apply to people in detention. The Department explained that:

> some of the exact details of the detention under these orders are still being worked in the negotiations and discussion with the states….there is a consciousness of the need to keep them separate.[108]

3.85 However, there is currently no provision in the Bill which takes account of the particular vulnerability of minors in police custody, remand centres or adult prisons. Nor does the Bill expressly require that a juvenile be held in a juvenile facility.

3.86 The Committee notes that an ASIO Protocol has been developed to guide ASIO's practices when executing a compulsory questioning and detention warrant. In relation to juveniles, it provides that 'questioning and detention may only take place under conditions that take full account of the subject's particular needs and any special requirements having regard to their age.'[109] HREOC has proposed that a Protocol that

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102 Professor Charlesworth, Professor Byrnes, Ms Mackinnon, *Submission 206*, p. 3.

103 Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005, s. 26X.

104 *Committee Hansard*, 14 November 2005, p. 10.

105 *Committee Hansard,*14 November 2005, p. 10.

106 ASIO Act, ss. 34NA(4).

107 *Committee Hansard*, 14 November 2005, p. 5.

108 *Committee Hansard*, 14 November, 2005, p.11.

109 See para. 6.1 of the Protocol made under subsection 34C(3A) of the ASIO Act.

address questions of the conditions of detention and treatment of detainees be developed to guide the practice of preventative detention.[110] (The Bill's special contact rules that apply to detained minors are discussed below.)

Preventative detention and criminal investigation

3.87 The Committee notes that the efficacy of preventative detention in assisting the police to investigate and prosecute suspected terrorists may be open question. Unlike the UK *Terrorism Act 2000,* which provides for pre-charge detention of terrorist suspects to assist a criminal investigation, the Bill introduces preventative detention for the express purpose of preventing an imminent act of terrorism and preserving relevant evidence. While preventative detention for these purposes may assist a criminal investigation, this is not an explicit purpose of the Bill.

Police questioning

3.88 Police interrogation of the detainee is prohibited except to: confirm their identity; ensure the safety and well being of the person; or otherwise allow the police to carry out their obligations under the Division.[111] The prohibition on police questioning is replicated in the complementary legislation introduced in South Australia and New South Wales.[112]

3.89 However, it is apparent that preventative detention orders will operate in conjunction with police questioning or arrest under the Crimes Act.[113] During hearings, the AFP explained that the powers are necessary to:

> allow police to detain suspected terrorists in order to protect the community while either ruling the detainees out of the investigation or forming the reasonable belief the detainees can be released from [preventative] detention, arrested and questioned under part 1C of the Crimes Act.[114]

3.90 It is unclear how this will be achieved without the ability to question a detainee, except that it provides an opportunity to collect evidence under separate search and seizure powers.

3.91 The prohibition on police questioning provides a safeguard in this respect. However, Dr Carne has suggested should be videotaped to ensure that questioning does not exceed the permitted purposes of proposed paragraphs 105.42(1)(a)(b) and (c), and preferably occur in the presence of the detainee's lawyer.[115] The

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110 *Committee Hansard*, 17 November, p. 51.

111 Proposed section 105.42.

112 Terrorism (Police Powers) (Preventative Detention) Bill 2005 (NSW), s. 26ZK. Terrorism (Preventative Detention) Bill 2005 (SA), s. 42.

113 Proposed sections 105.25 and s.105.26.

114 *Committee Hansard*, 17 November 2005, p. 55.

115 *Submission 8*, p. 23.

Commonwealth Ombudsman and Inspector General of Intelligence and Security have also recommended that a detainee be advised about the limitations on what that they can be questioned about while in detention.[116]

ASIO questioning

3.92 Preventative detention orders will also operate in conjunction with ASIO's compulsory questioning and detention powers under the ASIO Act.[117] Where an ASIO warrant for compulsory questioning or questioning and detention is in force, the AFP must release the person from preventative detention to be dealt with by ASIO.[118] ASIO are then permitted to question a person for up to 24 hours and 48 hours where an interpreter is used.[119] Release from preventative detention for questioning or detention under an ASIO warrant, or otherwise for arrest and charge under the Crimes Act, does not extend the period that the preventative detention order remains in force and a person cannot be re-detained under the order (if it has expired).[120]

3.93 The Committee notes that intelligence obtained (eg, anything said or thing produced) under an ASIO compulsory questioning warrant cannot be used in evidence against the person in criminal proceedings.[121] This protection against self incrimination does not extend derivative use immunity or to civil or administrative proceedings, such as a proceeding for a control order or an administrative process for the removal of a non national from Australia on national security grounds.[122]

Conditions of detention and treatment of detainees

Standards of treatment

3.94 Proposed section 105.33 expressly requires that a person detained under a preventative detention order must be treated with humanity and with respect for

116 *Submission 163*, p. 6.

117 An ASIO 'questioning only' warrant may be issued where there are reasonable grounds for believing that issuing the warrant will substantially assist in collecting intelligence that is important in relation to terrorism related offence; ASIO Act, para. 34D(1)(b).

118 Proposed section 105.25.

119 ASIO Act, ss.34HB (6) and (11).

120 Proposed subsections 105.25(4) and 105.26(7).

121 Evidence obtained during questioning may not be used in a criminal proceeding against the individual however it may be used in a criminal prosecution for giving false or misleading information. ASIO Act, s. 34G(9).

122 There is 'no derivative use immunity' and questioning may therefore lead ASIO and the AFP to other sources of evidence which can be used in criminal prosecution: paragraph 116(1)(g), s.s. 116(3) *Migration Act 1958* and regulation 2.43(2)(a).

human dignity and must not be subject to cruel, inhuman or degrading treatment.[123] The provision incorporates Articles 7 and 10 of the ICCPR.[124]

3.95 It is clear that proposed section 105.33 is an important safeguard. However, it has been suggested that this alone provides little guidance to police officers or detainees without further elaboration or clarification as to the conditions and standards of treatment that apply.[125] For example, HREOC has raised a concern about the possible use of solitary confinement. It recommended that such matters be dealt with in a Protocol, which should generally address issues relating to conditions of detention.

3.96 Professor John McMillan, the Commonwealth Ombudsman and Mr Ian Carnell, the Inspector General of Intelligence and Security (IGIS) made a similar proposal and referred the Committee to the Protocol developed to guide the implementation of ASIO's compulsory questioning and detention warrants as a useful model. The ASIO Protocol is a publicly available document which covers matters such as facilities and accommodation, food, sleep, personal hygiene, health care, religion and so forth.[126]

3.97 Professor McMillan and Mr Carnell advised the Committee that:

> A detailed statement of this sort, of the guarantees that a reasonable person would expect to apply to detention in these circumstances, can be a useful document in establishing a framework for good administrative practice and the protection of individual rights. A second useful purpose of a statement of protocols, if the Bill either contained or required such a protocol to be developed, might be to further specify how preventative detention orders and questioning and detention warrants would operate together in a practical sense, if both applied to a given situation.[127]

Oversight of conditions of detention and treatment of detainees

3.98 The Bill requires a nominated senior AFP member to oversee the exercise of powers under, and the performance of obligations in relation to, the preventative detention order. That officer is also responsible for ensuring that provisions relating to

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123 Proposed section 105.33

124 It is noted that Australian correctional facilities where detainees may be held operate under the *Minimum Standards Guidelines for Australian Prisons based on the UN Minimum Standards for the Treatment of Prisoners*. See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; UN GA Resolution 43/173, 9 December 1988.

125 *Committee Hansard*, p. 51.

126 Australian Security Intelligence Organisation Protocol available at http://www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/index.htm

127 *Submission* 163, p. 6.

the revocation of preventative detention orders and the issuing and implementation of prohibited contact orders are complied with.[128]

3.99 It is unclear on the face of the legislation whether there is any intention that the role of the nominated officer will extend beyond supervision of the conduct of police officers. It seems unlikely the senior police officer will have any jurisdiction in relation to conditions of detention or standards of treatment in a State or Territory prison or remand centre, except in relation to police conduct. The role of the nominated senior officer will cease once the person is released from preventative detention.

3.100 Part 1C of the Crimes Act will apply a detainee is released from preventative detention in order to be arrested and dealt with under that Act. Detainees released for the purpose of an ASIO compulsory questioning warrant may be questioned in the same police station and in the presence of AFP officers. However, the supervision of that questioning is the responsibility of a Prescribed Authority under the ASIO Act. The IGIS may also be present to monitor the standards of treatment and receive any complaints.

3.101 The IGIS and the Commonwealth Ombudsman have extensive powers and play an important role in oversighting government activity, which has the potential to infringe liberty or otherwise lead to adverse outcomes for individuals. The combined submission of the Ombudsman and the IGIS sets out in some detail, the scope of those powers and the relevance of their respective offices to oversight of the powers proposed by the Bill.[129] It was noted that the Bill does not provide the Ombudsman with a clear right of entry to premises used for preventative detention.[130]

3.102 The Ombudsman and IGIS observed that consideration could be given to specifying in subsection 105.19(7) that the nominated senior AFP member's responsibilities include the requirement to ensure that the conditions of detention fully comply with proposed section 105.33 (and with any protocol, procedures or guidelines). Further, the Bill could require the nominated AFP member to advise the issuing authority and/or the Ombudsman where there is a breach of the statement of procedures.[131] It has also been suggested that the nominated senior AFP member should be required to provide the Ombudsman immediately with a copy of the detention and contact orders, and of the summary of reasons, in cases where a legal adviser is not available to the subject of the order or orders.[132]

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128 Proposed section 105.19.

129 *Submission 163*, p. 6.

130 *Submission 163*, p. 6.

131 *Submission 163*, p. 7.

132 *Submission 163*, p. 7.

Information about rights

3.103 The effect of an initial and continued preventative detention order and any extension to those orders must be explained to the detainee as soon as practicable after the order has been made.[133] The information must include:

- the fact the order has been made;
- the period of detention;
- any restrictions which apply to contact with the outside world;
- the right to complain to the Commonwealth Ombudsman in relation to the AFP or equivalent State authority in relation to State police;
- the fact the person may seek a remedy from a federal court in relation to the order or their treatment under the order;
- the fact they are entitled to contact a lawyer; and
- the name and work number of supervising senior officer.[134]

3.104 The Ombudsman and IGIS have proposed that information concerning the above-mentioned right to apply to the AAT on expiration of the order should be included in the above. The right to apply to the Supreme Court for review of the Commonwealth order if the person is subsequently detained under a State order is also omitted from the above list. The Committee was advised that:

> The subject of the order should also be advised about the limitations in item 105.42 on what that person can be questioned about while in detention under the preventative detention order should also be included.[135]

3.105 The ARC also proposed that the information on the effect of the order should be provided to the detainee at the time the person is taken into custody, rather than 'as soon as practicable' thereafter.[136]

Limited contact with the outside world

3.106 Part IC of the *Crimes Act 1914* provides persons under arrest or being questioned by police with an express right to communicate with a friend, relative and legal practitioner before being questioned by police.[137] In contrast, proposed section 105.34 takes as its starting point that a detainee has no right to contact with any other person and is prevented from contacting anyone except where permitted by the Bill. (See the discussion on prohibited contact orders below.)

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133 Proposed section 105.29.

134 Proposed sections 105.29 and 105.30.

135 Professor John McMillan, Commonwealth Ombudsman and Mr Ian Carnel, Inspector General of Intelligence and Security, *Submission 163*, p. 6.

136 *Submission 262*, p. 2.

137 Crimes Act, s.23G.

3.107 Proposed section 105.35 permits, subject to a prohibited contact order, a detainee to contact: one of his or her family members;[138] and one person from each of the categories listed in that provision. These categories include: another person with whom he or she lives; an employer; an employee; a business partner or another person if the detaining police officer agrees.

3.108 Communications are strictly limited and the detainee must not disclose: the fact that a preventative detention order has been made; the fact that he or she is being detained; or the period of the detention.[139] It follows that a detainee must not disclose their whereabouts and there is no provision for visits. Contact may be made by telephone, fax or email, but is solely to let the person know that he or she is 'safe' but cannot be contacted for the 'time being'.[140] It is an offence carrying a penalty of up to 5 years imprisonment to breach the rules of disclosure (see below).

3.109 The Victorian Council for Civil Liberties expressed their concern that the limits on what can be said are disproportionate and will not achieve their objective:

> We are also concerned about the provision which places strict limits on what a person subject to the order may say to their family and other limited categories of person about their detention. Presumably the provision is designed to ensure that the fact of a person's detention is not capable of communication to others with whom the person may have been preparing to engage in terrorist activity. If this is so, the provision will not achieve its objective. It would be simple to have a pre-determined form of words, perhaps couched in the language of the statutory provision, which would indicate clearly to others what had actually occurred. The cost to others who had not reasonably have been detained would be substantial however**.** They would be cut off entirely from family, friends and associates who may be in a position to offer them some assistance even if only of an emotional kind.[141]

3.110 As explained above, special contact rules will apply to minors or people who lack capacity to manage their own affairs.[142] A minor is entitled to contact each of their parents or guardians or another person who is able to represent their interests. They are permitted to disclose the fact of the detention order and that the person is being held subject to the order and the period of detention.[143] These special contact provisions for minors remain subject to the issue of prohibited contact order and the criminal offences provisions concerning unauthorised disclosure (see below).

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138 Immediate family and grandparents and guardians and carers are included in the definition of family. De facto spouses or same sex partner, step parents and step children are also included.

139 Proposed subsection 105.35(2).

140 Proposed paras. 105.35(1)(a),(b)(I)(ii), (c), (d), (e) and (f).

141 *Submission 221*, p. 22.

142 Proposed section 105.39.

143 Proposed paras. 105.39(2)(a) and (b), and paras. 105.39 (3)(a) and (b).

3.111 Proposed section 105.37 preserves the right of a detainee to contact the Commonwealth Ombudsman under section 22 of the *Complaints (Australian Federal Police) Act 1981* and an equivalent State or Territory authority. There is no explicit provision in the Bill for the Ombudsman to visit a detainee in a police cell or State or Territory correctional facility. A right of access to a lawyer is also preserved under certain restrictions (see below).

3.112 The committee notes the concerns that the Bill, as currently drafted, will create practical difficulties for communications between detainees and their families and for the ability of detainees' family members to communicate with each other and others. It notes that an alternative approach might have been to regulate contact with family members through the use of prohibited contact orders rather than imposing a blanket ban on detainees' contact with others except where permitted by the Bill.

Prohibited contact orders

3.113 The limited provision for communication with the outside world may be further restricted by the operation of proposed new sections 105.15 and 105.16. These provisions confer a wide discretion on the AFP and other issuing authorities to issue a prohibited contact order to prevent communication by the detainee with 'a person' where the issuing authority is satisfied that the exclusion: 'would assist in achieving the objectives of the preventative detention order'.

3.114 The order may be issued by a senior AFP member on the unsworn information of a more junior officer when making or during an initial order; or by another issuing authority when the continued detention order is made or at another time while the continued detention order is in force.[144] The application must set out the terms of the order sought and the facts and grounds on which the AFP member considers the order should be made, and must be sworn or affirmed if the person is being detained under a continued preventative detention order.

3.115 The purpose of prohibited contact orders was explained in the EM in the following terms:

> This is designed to ensure 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.[145]

144 Proposed sections 105.15 and 105.16.

145 *Explanatory Memorandum*, p. 47.

3.116 The provision for prohibited contact orders are to be replicated in State and Territory complementary legislation.[146]

3.117 Many witnesses have argued that this aspect of the Bill is disproportionate; the discretion is too broad and lacks proper judicial supervision. Prohibited contact orders create the possibility of detention that is secretive and is very close to being detention *incommunicado,* which is prohibited as a protection against ill-treatment.[147]

3.118 Of particular concern to some was the low and generalised threshold for the grant of a prohibited contact order: that is, that 'making the prohibited contact order will assist in achieving the objectives of the preventative detention order'. Dr Carne advised:

> … this phrase could mean anything, and is wide open to abuse. If prohibited contact orders are to be retained, the threshold must be dramatically increased … the issuing authority of prohibited contact orders should be removed from senior AFP officers.[148]

3.119 HREOC also had concerns with the breadth of the nondisclosure requirements. It observed that:

> …. for example, why should an employer be prevented from giving instructions solely for the running of a legitimate business? Why should an employee be prevented from telling their employer what steps need to be taken on an urgent task? And who bears the financial consequences for any loss arising from these restrictions?[149]

3.120 Dr Carne also questioned the lack of protection against unfair dismissal by an employer and against possible penalties that could be applied to a person dependent upon a Centrelink payment. He suggested that it be an offence for an employer to dismiss or penalise a person subject to a detention order and that a similar protection from a Centrelink penalty should be provided.[150]

3.121 HREOC argued that the restrictions raise issues under article 10(1) of the ICCPR, which provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. In particular, HREOC pointed to internationally accepted minimum standards for the treatment of

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146 Proposed section 26N of the Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005 requires that all applications for a prohibited contact order be made to the Supreme Court.

147 HREOC, *Submission 158,* pp. 17, 19; Dr Mathews, *Submission 187*, p. 10; Dr Carne, *Submission 8*, p. 21.

148 *Submission 8*, p. 21.

149 *Submission 158*, p. 16.

150 *Submission 8,* p. 20.

detainees.[151] HREOC argued that the latter are designed to avoid 'incommunicado detention', which has been found to breach the right to be treated with humanity and dignity.

3.122 HREOC formed the view that the limited contact permitted under the Bill falls short of these minimum international standards:

> The Bill does not provide a right to receive visits from family members (rule 37 of the Standard Minimum Rules) – such contact is only guaranteed in the case of people aged between 16 and 18 years of age. The limits on what may be disclosed also fail to meet the requirements of Principle 16 of the Body of Principles. Some departure from those standards is permissible in exceptional circumstances. For example, the notification required under rule 37 may be delayed for a 'reasonable period' where the 'exceptional needs of the investigation so require'. The Commission doubts that such exceptions justify the approach taken in the Bill: a family member who is involved in a terrorist conspiracy would be likely to be alerted to the fact that the person is being preventatively detained by virtue of the somewhat odd communication envisaged under proposed s105.35(1). An 'innocent' family member is simply likely to be alarmed.

3.123 The Committee notes that, in contrast to the Bill, the UK *Terrorism Act 2000* provides for an express right to communicate with a friend, family or another person interested in their welfare and to let those people know when the detainee is moved to another police station.[152] As explained below, communications with others may be delayed, but there is no ban on informing family of the reasons for detention, the period of detention of the whereabouts of the detainee.

3.124 The UK legislation provides that a senior police officer of the rank of inspector or above, who has no connection with the investigation, may delay (but not preclude) contact between a detainee and their family, friend or solicitor. This may only occur if he has reasonable grounds to believe that any of the following specified grounds apply:

- interference with or harm to evidence of a serious arrestable offence;
- interference with or physical injury to any person;

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151 That is, the *Standard Minimum Rules for the Treatment of Prisoners* and the *Body of Principles for the Protection of all Persons under any form of Detention*. Rule 37 of the Standard Minimum Rules under the heading "Contact with the outside world", provides: Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits. Principle 16 of the Body of Principles states: Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate. See *Submission 158*, pp 17.

152 *Terrorism Act 2000* (UK), Schedule 8, ss. 6(3).

- alerting of persons suspected of an arrestable offence who have not been arrested;
- hindering recovery of property obtained as a result of a serious arrestable offence
- interference with gathering information about the commission, preparation or instigation of acts of terrorism;
- alerting a person making it more difficult to prevent an act of terrorism.[153]

Disclosure offences

3.125 As noted above, the Bill provides that a detainee commits a criminal offence with a penalty of up to 5 years imprisonment if he or she intentionally discloses:

- the fact of the detention order;
- that he or she is detained under an order;
- how long the person is being detained; or
- or any other information given during the contact.[154]

3.126 The offence provisions extend the non-disclosure obligation to anyone with whom the detainee has contact and are intended to strictly prohibit all secondary disclosures. The offences specifically include the lawyer and the family member or guardian contacted by the detainee. If any person receives improperly disclosed information, it is an offence to intentionally pass that information on to another person.[155]

3.127 The offences also apply to the interpreter and police officers monitoring the communication (although the maximum penalty in respect of these classes of people is 2 years as opposed to 5 years).[156]

3.128 There is a limited exception for lawyers, where the disclosure is for the purpose of proceedings in a federal court, a complaint to the Ombudsman or equivalent State authority or making representations to the nominated senior AFP member responsible for supervising the execution of the order.[157] The lawyer is unable to make any disclosure within his or her own practice, even for the purpose of preparing an application to a federal court. The Explanatory Memorandum states:

> There is no provision for the person's lawyer to disclose information he or she lawfully obtains from the person under new section 105.37 because if

153 *Terrorism Act 2000* (UK), Schedule 8, ss.8(3)and (4).

154 Proposed section 105.41.

155 Proposed subsection 105.41(6).

156 Proposed subsections 105.41(4) and (5).

157 Proposed subsection 105.41(2), para.105.41(2)(b) and subparas.105.41(2)(d)(i) to (iv).

> the lawyer wishes to seek advice from a barrister, for example, it should not be necessary to disclose the fact of the particular person's detention to that barrister.[158]

3.129 It has been pointed out that it would be a criminal offence for a lawyer to make representations on the person's behalf to their Member of Parliament unless the disclosure was for the purpose of a Parliamentary inquiry in which case it would attract parliamentary privilege.[159]

3.130 Where the detainee is under 18 years, it is not an offence for the family member or guardian to let another person know the detainee 'is safe but is not able to be contacted for the time being'.[160] However, it is an offence for the parent or guardian to disclose the fact the order has been made, that the person is being detained under the order and the period of detention if the detainee has not already had contact with that other parent under the special contact rules provided for in section 105.39.

3.131 In response to questioning, Dr Watchirs said:

> I think the five year penalty for breach of disclosure provisions and breach of control orders is grossly disproportionate. They are civil offences and a civil administrative process, particularly in preventative detention, and to have a criminal offence of five years is not proportionate.[161]

3.132 The Victorian Council for Civil Liberties agreed:

> We are disturbed by the disclosure offences and the severe penalties that attach to such unauthorized communications. As the proposed law stands, a family member who is either told or divines that the subject has been placed on a preventative detention order is prohibited from informing any other family member on pain of five years imprisonment. To provide that an intra-familial communication should attract such a draconian penalty goes far beyond what is proportionate in the circumstances. It is difficult to imagine that any one in the community would accept that a father's communication to a mother that their son or daughter has been placed on a preventative detention order should attract a long-term sentence of imprisonment. In these circumstances, we recommend that the disclosure provisions of the Bill be removed and further reviewed if some other means of engendering a certain measure of secrecy is required.[162]

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158 *Explanatory Memorandum*, p. 64.

159 Similarly, it would be a criminal offence for any Parliamentarian who became aware of a preventative detention order to disclose that fact publicly, unless protected by parliamentary privilege. This would not protect the source of the information.

160 Proposed subsection 105.41(3).

161 *Committee Hansard*, p. 97.

162 *Submission 221*, p. 23.

3.133 The Media, Entertainment and Arts Alliance argued against the nondisclosure provisions and the threat of criminal penalty:

> Appropriately, section 105.33 of the Bill affords persons detained under the legislation the right 'to be treated with humanity and respect for human dignity' and states that such persons must not be subjected to cruel, inhuman or degrading treatment'. Yet, in the event the rights of such a person are violated, the Bill denies the opportunities for such a violation to be reported in the media. Just as astonishing is the fact that the penalty for an officer who commits an offence …is 2 years imprisonment, compared to the five years sentence a journalist could face or disclosing the fact of a preventative detention.

3.134 The Alliance noted that the ASIO Act contains secrecy provisions which are also of concern to them. However, unlike the Bill, that Act includes a provision which provides that it: 'does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication' [163]

3.135 The Committee notes equivalent ASIO provisions apply secrecy obligations to the compulsory questioning and detention warrant regime for 2 years.[164] The Bill provides that a commonwealth preventative detention order is limited to 48 hours and the disclosure offence provisions apply only for the period of detention. However, the committee understands that the combined effect of a Commonwealth and subsequent State order may mean that a person could be held in preventative detention for up to 16 days.

3.136 The committee notes that the States appear to have taken differing approaches on this issue. Proposed subsection 35(2) of the South Australian Terrorism (Preventative Detention) Bill 2005 replicates the Commonwealth provision and prohibits disclosure of the facts relating to the preventative detention order. However, proposed subsection 26ZE(2) of the New South Wales Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005 does permit a detainee to disclose: the fact that a preventative detention order has been made; the fact that the person is being detained and the period for which the person is being detained.

Lawyer/ Client Relationship

Restricted access to legal advice and monitoring lawyer client communications

3.137 Proposed section 105.37 indicates that a detainee may contact a lawyer for the specific purposes of:

- obtaining advice about their legal rights in relation to the preventative detention order or their treatment during their detention under the order;

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163 ASIO Act, s.34VAA (12); *Submission 193*, p. 3.

164 ASIO Act, s.34VAA.

- instructing their lawyer to act in proceedings in a federal court in relation to the order or their treatment while in detention; or
- instructing their lawyer to act in relation to making a complaint to the Ombudsman or to an equivalent State or Territory authority.

3.138 Where a prohibited contact order precludes contact with a particular lawyer, the police officer must 'give the person reasonable assistance' to choose another lawyer for the person to contact.[165]

3.139 Proposed section 105.38 requires that all communications between the lawyer and his or her client be monitored by the police.[166]

3.140 In respect of the Bill, numerous witnesses and submissions objected to: the restrictions on access to a lawyer; the breadth of the test to be applied for prohibiting contact with a lawyer of choice; and the monitoring of lawyer/client communications, which they regard as excessive and unjustified.[167] Witnesses also argued that a detainee's right to confidential communications with their lawyer is a fundamental human rights norm at the international level (such as under the UN Body of Principles for the Protection of All Persons under Any Form of Detention and the UN Basic Principles on the Role of Lawyers).[168]

3.141 The Law Council complained to the committee that:

- the Bill's restriction on the role of the lawyers is a very significant and unacceptable diminution of the right to legal advice;
- the monitoring of lawyer/client communications abandons the rules in relation to client/lawyer confidentiality and is an anathema to a system of justice which depends in significant part on the sacrosanct nature of client/lawyer communications; and
- access to a lawyer should be facilitated within a reasonable time of an initial preventative detention order being made.[169]

3.142 The Australian Council for Civil Liberties (ACCL) noted legal advice it had obtained was that the provisions for contacting a lawyer and monitoring a lawyer will allow police to tape record a lawyer talking to his or her client who is held in

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165 Proposed subsection 105.37(3).

166 Proposed subsection 105.38(1).

167 See, for example, Australian Council for Civil Liberties, *Submission 17*, pp. 9-10; Victorian Council of Civil Liberties, *Submission 221,* p. 22; NSW Council of Civil Liberties, *Submission 161*, p. 12; Queensland Council of Civil Liberties, *Submission 223*, p. 10.

168 See for example, Amnesty International, *Submission 141* p.26.

169 *Submission 140*, p.16. See also, for example, Women Lawyers Association of New South, *Submission 137*; Australian Council for Civil Liberties, *Submission 17*; Victorian Council for Civil Liberties, *Submission 221*.

preventative detention while that client is held in a police station, watch house or prison. The Department also agreed that monitoring of lawyer/client communications included the possibility of tape recording and that there are no provisions in the Bill to limit how long a record of the communication can be kept.[170] The ACCL argued that:

> It has been a central aspect of the law and practice relating to lawyer talking to their clients in police custody for hundred of years that that communication can not be listened to or eavesdropped on. The rationale for this longstanding provision is obvious and that is that if a preventatively detained person knows that his conversation with his lawyer is being monitored and tape recorded he simply will not be prepared to talk to his lawyer for fear that what he says will then be used to carry out further investigations and so result in the detained person being charged with a criminal offence and being further detained.[171]

3.143 Proposed subsection 105.38(5) provides that any lawyer /client communication is inadmissible against the person in any proceedings in a court. However, the Department confirmed that this use immunity extends only to communications which fall within the strict limits for which access to legal advice is allowed under the Bill.[172] It has no application to communication that falls outside the scope of those limits. It does not, for example, protect a detainee who discloses information that indicates his possible involvement in a criminal offence and seeks advice, for example, in relation to whether any admissions should be made or may implicate another person.

3.144 The Department noted that the disclosure offences which apply to police officer monitoring lawyer/client communication will provide a safeguard.[173] However, the Queensland Law Society and Queensland Bar Association noted that:

> There is no real protection afforded by the prohibition on disclosure by a police monitor (s.105.41 (7)) Other persons, including law enforcement officials, are not inhibited from accessing and making whatever use they care to of the contents of the recording (save for the limitation on admitting certain parts of it in evidence (s.105.38(5)).[174]

3.145 In assessing the overall impact of these measures, the Law Council concluded that:

> These measures hinder the administration of justice. Such measures will seriously impede a detained person in giving sensible instructions to his or her lawyer in which sensitive but innocent information is contained which could form, in part at least, the basis of an application challenging such an

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170 See discussion at *Committee Hansard*, 14 November 2005, p. 25.

171 ACCL, *Submission* 17, p. 11.

172 paras. 105.37(1)(a) to (e).

173 *Committee Hansard*, 14 November 2005, p. 25.

174 *Submission* 222, p. 8.

> order to be brought to the Federal Court, in circumstances where that information is fed directly to the State. It constitutes an unacceptable obstruction to lawyers performing their duty to the client.[175]

Comparable jurisdictions

3.146 The equivalent UK terrorism law expressly recognises the right of detainees to consult a solicitor as soon as is reasonably practicable, privately and at any time.[176] The UK law allow contact with a solicitor to be delayed on the authority of a Superintendent, but not precluded. Terrorism laws in the UK and the United States (US) also allow contact between 'detainees' and their lawyers to be monitored. However, the US and UK legislation contain a threshold test that must be met before communications between a solicitor and client can be monitored, which does not include the ability to tape record those communications.

3.147 The *Terrorism Act 2000* (UK) allows for a consultation between lawyer and detainee to be held "in the sight and hearing" of a police officer, if a senior police officer has reasonable grounds to believe that such consultation would lead to interference with the investigation on the basis of grounds elaborated in the Act (see above). Separate provisions, in relation to Scotland, similarly allow for an officer "to be present during a consultation".[177]

3.148 In the US, the Attorney General must certify that "reasonable suspicion exists to believe that an inmate may use communications with attorneys or their agents to further or facilitate acts of violence or terrorism". The rule relevantly provides:

> [I]n those cases where the Attorney General has certified that reasonable suspicion exists to believe that an inmate may use communications with attorneys or their agents to further or facilitate acts of violence or terrorism, this rule amends the existing regulations to provide that the Bureau is authorized to monitor mail or communications with attorneys in order to deter such acts, subject to specific procedural safeguards, to the extent permitted under the Constitution and laws of the United States.[178]

The committee's view

3.149 The committee received a significant amount of evidence in relation to the preventative detention provisions in the Bill. With the exception of the evidence from the Attorney-General's Department and the AFP, this evidence indicated significant opposition to the potential impact of these provisions.

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175 *Submission 140*, p.17.

176 *Terrorism Act 2000* UK, section 7, Schedule 8.

177 Schedule 8, Part I, section 9:http://www.opsi.gov.uk/acts/acts2000/00011--u.htm#sch8ptI

178 28 CFR Parts 500 and 501: National Security; Prevention of Acts of Violence and Terrorism; Final Rule [excerpt]: The full regulation (also cited as 66 Fed. Reg. 55,061, 55,063 [October 31, 2001]) can be viewed at: http://www.epic.org/privacy/terrorism/bop_rule.pdf .

3.150 At the same time, the committee is cognisant that the purpose of the proposed provisions is to protect the community. The committee also recognises that the preventative detention regime is intended to apply in exceptional circumstances and, while many witnesses are opposed to the scheme, the emphasis during this inquiry has been on possible amendments to strengthen procedural safeguards. The committee also notes the advice from the AFP that it did not oppose any such amendments which would not unduly undermine its operational capacity to respond in a time of emergency.[179]

3.151 In this context, the committee's view is that further amendments are required to the proposed preventative detention regime in order ensure that the regime will be both fair and effective. These recommended amendments are listed below. In making these recommendations, the committee had regard to precedent that existed in overseas jurisdictions, including those who had suffered terrorism attacks. The committee is satisfied that none of its recommended amendments will unduly impinge on effective law enforcement or the objectives of the preventative detention regime.

Recommendation 2

3.152 The committee recommends that proposed section 105.12 be amended, or a new provision inserted into the Bill, to provide a detainee with an express statutory right to present information to the independent issuing authority for a continued preventative detention order, to be legally represented and to obtain the published reasons for the issuing authority's decision.

Recommendation 3

3.153 The committee recommends that:

(i) the Bill be amended to expressly require that young people between the ages of 16 and 18 years of age must not be detained with adults while in police custody;

(ii) proposed section 105.27 be amended to require the segregation of minors from adults in State and Territory facilities; and

(iii) proposed section 105.33 be amended to expressly require that minors must be treated in a manner that is consistent with their status as minors who are not arrested on a criminal charge.

Recommendation 4

3.154 The committee recommends that proposed section 105.28 be amended to place an obligation on police officers to ensure access to a detainee by a lawyer and an interpreter, as necessary, in cases where there are reasonable grounds to believe that the detainee is unable to understand fully the effect of the preventative detention order because of inadequate knowledge of the English language or a mental or physical disability.

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179 Deputy Commissioner Lawler, *Committee Hansard*, 17 November 2005, p. 72.

Recommendation 5

3.155 The committee recommends that proposed sections 105.28 and 105.29 be amended to expressly require that detainees be advised that they can make representations to the nominated senior AFP member concerning revocation of the preventative detention order.

Recommendation 6

3.156 The committee recommends that proposed section 105.28 be amended to expressly require that the detainee be advised that he or she can contact the family members referred to in proposed section 105.35.

Recommendation 7

3.157 The committee recommends that proposed section 105.32 be amended to provide that the detainee shall be provided with a copy of the order and the reasons for the decision, including the materials on which the order is based, subject to any redactions or omissions made by the issuing authority on the basis that disclosure of the information concerned is 'likely to prejudice on national security' (as defined in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)).

Recommendation 8

3.158 The committee recommends that proposed sections 105.15 and 105.16 be amended to elaborate the grounds for a prohibited contact order. The committee also recommends that these grounds be equivalent to those provided in the UK terrorism legislation, namely:

- **(i) interference with or harm to evidence of a terrorism related offence;**
- **(ii) interference with or physical injury to any person;**
- **(iii) alerting of persons suspected of a terrorism related offence who have not been arrested;**
- **(iv) hindering recovery of property obtained as a result of a terrorism related offence;**
- **(v) interference with gathering information about the commission, preparation or instigation of acts of terrorism; and**
- **(vi) alerting a person and thereby making it more difficult to prevent an act of terrorism.**

Recommendation 9

3.159 The committee recommends that the Bill be amended to:

- **(i) authorise oversight by the Commonwealth Ombudsman of the preventative detention regime, including conferral of a statutory right**

for the Ombudsman to enter any place used for detention under a preventative detention order; and

(ii) require the nominated senior AFP officer - in circumstances when a legal adviser is not available to the detainee - to notify the Ombudsman when a preventative detention order and a prohibited contact order is made and to provide the Ombudsman with a copy of any such order and reasons for those orders.

Recommendation 10

3.160 The committee recommends that the Bill be amended to require the Minister - in consultation with HREOC, the Ombudsman and the Inspector-General for Intelligence and Security – to develop a Protocol governing the minimum conditions of detention and standards of treatment applicable to any person who is the subject of a preventative detention order.

Recommendation 11

3.161 The committee recommends that proposed paragraph 105.41(3)(c) be amended to refer to the persons whom the detainee has a right to contact instead of persons with whom the detainee has had contact.

Recommendation 12

3.162 The committee recommends that proposed subsection 105.42(1) be amended to require that any questioning which takes place during the period of the preventative detention order be videotaped and generally occur in the presence of the detainee's lawyer.

Recommendation 13

3.163 The committee recommends that the Bill be amended to remove the restrictions on lawyer/client communications and to allow a legal representative to advise his/her client on any matter. The committee also recommends that proposed section 105.37 be amended to affirm the right of a detainee, subject to a prohibited contact order, to contact their lawyer of choice and to consult their lawyer at any time and in privately.

Recommendation 14

3.164 The committee recommends that proposed section 105.38 be amended to permit monitoring of detainees' consultation with their lawyers only where the nominated AFP officer has reasonable grounds to believe that the consultation will interfere with the purpose of the order.

Recommendation 15

3.165 The committee recommends that the Bill be amended to prohibit reliance on hearsay evidence in proceedings for the issue of a continued preventative detention order.

Recommendation 16

3.166 The committee recommends that proposed section 105.47 be amended to require the Attorney General to report on Commonwealth preventative detention orders on a six monthly basis and that, in addition to the matters currently set out in that provision, the information should include the number of orders voided or set aside by the AAT.

Recommendation 17

3.167 The committee recommends that the Bill be amended to include an express requirement for a public and independent five year review of the operation of Division 105 adopting the same mechanism and similar terms as that provided by section 4 of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), which established the Sheller Committee.

Recommendation 18

3.168 The committee recommends that proposed section 105.53 be amended to include a sunset clause of five years applicable to Schedule 4.

CHAPTER 4

CONTROL ORDERS

Introduction

4.1 This chapter will outline the key provisions and issues raised in relation to Schedule 4 of the Bill, which seeks to introduce a regime of 'control orders' to authorise the overt close monitoring of terrorist suspects.

Outline of the control order regime

4.2 Item 24 of Schedule 4 inserts new Division 104 into the Criminal Code to authorise the issue of control orders for the express purpose of protecting the public from terrorist attack.[1] The scheme provides for four types of control orders**:**

- interim control orders;
- urgent interim orders (electronic);
- urgent interim order (in person); and
- confirmed control orders.[2]

4.3 An interim control order may be requested by a senior member of the AFP, but the written consent of the Commonwealth Attorney-General must be obtained before the application is made.[3] In urgent circumstances, a senior AFP member may apply directly to the Court for an urgent interim control order.[4] The application may be by electronic means or in person.[5] If an urgent interim control order is sought and made, the Attorney-General's consent to the order must be obtained within 4 hours of the order being made.[6]

Grounds for application

4.4 The AFP may only seek the Attorney-General's consent if the AFP member:

- considers on reasonable grounds that the order in the terms to be requested would substantially assist in preventing a terrorist act; or
- suspects on reasonable grounds that the person has provided training to, or received training from, a listed terrorist organisation.[7]

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1 Proposed section 104.1.

2 Proposed sections 104.4, 104.7, 104.9 and 104.12.

3 Proposed section 104.2.

4 Proposed sections 104.6 and 104.8.

5 Proposed sections 104.6 and 104.8.

6 Proposed section 104.10.

7 Proposed section 104.2.

4.5 For the reasons explained below, the senior AFP member will also have to be satisfied that a court would find that the order being sought is reasonably necessary to protect the public from a terrorist act (see paragraphs 4.8 to 4.9 below).

4.6 In seeking the Attorney-General's consent, the member must provide the Attorney-General with a draft request that includes:

- a draft of the interim control order to be requested;
- a statement of facts relating to why the order should be made;
- a statement of any facts that the member is aware of as to why the order should not be made;
- an explanation as to why each of the obligations, prohibitions and restrictions being sought should be imposed on the person concerned;
- a statement of any facts that the member is aware of as to why any of the obligations, prohibitions and restrictions being sought should not be imposed;
- the outcomes and particulars of all previous requests for interim control orders (including the outcomes of the hearings to confirm the orders);
- the outcomes and particulars of all previous requests for applications for revocations of control orders made in respect of the person;
- the outcomes and particulars of all previous requests for applications for preventative detention orders in respect of the person, including information, if any, the member has about any periods for which the person has been detained under State preventative detention law; and
- any information the members have about the person's age.[8]

The Attorney General's consent may be made subject to changes being made to the draft request, including the draft interim control order.[9]

Court procedure

4.7 A control order may be issued by the Federal Court, the Family Court of Australia or the Federal Magistrates Court.[10] The Bill provides that the Court in question may make the order if the senior AFP member has requested it in accordance with above requirements and the court has received and considered any further information required by the court.[11]

4.8 To make the order, the Court must be satisfied on the balance of probabilities that:

- making of the order would substantially assist in preventing a terrorist act; or

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8 Proposed ection 104.2.

9 Proposed subsection 104.2(4).

10 See Item 11 of Schedule 4 and proposed sections 104.4, 104.7, 104.9 and 104.14.

11 Proposed paras. 104.4(1)(a) and (b).

- the person to be subjected to the order has been trained by, or provided training to, a listed terrorist organisation.[12]

4.9 The Court must also be satisfied on the balance of probabilities that each of the obligations, prohibitions or restrictions to be imposed on the person is 'reasonably necessary' and 'reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act'.[13]

4.10 In making that determination, the Court must take into account the impact of each proposed obligation, prohibition and restriction on the person's circumstances, including the person's financial and personal circumstances.[14] The Bill expressly provides the Court with the discretion not to include an obligation, prohibition or restriction if the Court is not satisfied that a term of the order sought by the AFP is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act.[15]

4.11 If the Court makes an interim control order, that order must, among other things, specify the period during which the confirmed control order is to be in force (which must not be more than 12 months from the date that the interim order is made). The interim order must also specify the day on which the court will determine whether to confirm, vary, declare void or revoke the interim control order.[16] Proposed subsection 104.5(2) clarifies that, while the period of a confirmed order cannot be more than 12 months, there is no prohibition on the making of successive control orders in relation to the same person.

Notification of interim order and summary of grounds

4.12 Proposed section 104.12 requires that, as soon as practicable after the Court issues an interim order, a copy of the order and a summary of grounds on which it was made must be served on the person subject to the order. The order must be served on the person at least 48 hours before the day specified in the order as the day of the confirmation hearing.[17]

4.13 The following must also be explained by the AFP to the person concerned at the time of service of the above-mentioned documents: the effect of the order; the right of their lawyer to collect a copy of the order and summary of grounds; the procedure by which the interim order is to be confirmed by the court; and the right of the person to apply for a revocation or variation of a confirmed order.[18]

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12 Proposed para. 104.4(1)(c).

13 Proposed para. 104.4(1)(d).

14 Proposed subsection 104.4(2).

15 Proposed subsection 104.4(3).

16 Proposed paras. 104.5(1)(e) and (f).

17 Proposed subsection 104.12(1).

18 Proposed sections 104.12 and 104.13.

Confirmation of interim control order

4.14 The Bill limits the persons who may appear at a subsequent *inter partes* hearing to confirm the control order to:

- the senior AFP member who requested the order;
- one or more other AFP members;
- the person who is the subject of the order;
- one or more representatives of the person;
- the Queensland Public Interest Monitor if the person is a Queensland resident or if the interim order was made in Queensland.[19]

At the confirmation hearing, the Court may confirm the interim control order if satisfied at the time of the hearing of the requirements of proposed paragraph 104(1)(c) and (d) (as outlined at paragraphs 4.8 – 4.10 above). Alternatively, the Court may:

- declare the order void if satisfied that there were no grounds on which to make the order;[20]
- revoke the interim order if the Court is not satisfied that the order would substantially assist in preventing a terrorist act or is not satisfied that the person has provided training to or received training from a listed terrorist organisation;[21] or
- confirm, but vary the order by removing one or more obligations, prohibitions or restrictions if satisfied that one of the grounds mentioned in paragraph 4.8 above exists, but that the obligations, prohibitions or restrictions concerned are not reasonably necessary or reasonably appropriate and adapted for the purpose of protecting the public from terrorist act.[22]

The Court has the discretion to confirm an interim control order without variation, if the subject of the order does not appear in court and the court is satisfied, on the balance of probabilities, that the interim order was properly served on the person.[23]

Scope of control order restrictions

4.15 Proposed section 104.5(3) provides that a control order may impose any or all of the following restrictions:

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

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19 Proposed subsection 104.14(1).

20 Proposed subsection 104.14(6).

21 Proposed para.104.4(1)(c).

22 Proposed para. 104.4.1(d).

23 Proposed subsection 104.14(4).

- a prohibition or restriction on the person leaving Australia;
- a requirement that the person remain at specified premises between specified times each day or on specified days;
- a requirement that the person wear a tracking device;
- a prohibition or restriction on the person communicating or associating with specified individuals;
- a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the internet);
- a prohibition or restriction on the person possessing or using specified articles or substances;
- a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);
- a requirement that the person report to specified persons at specified times and places;
- a requirement that the person allow himself or herself to be photographed and/or fingerprinted (but only to ensure compliance with the order – see proposed section 104.22);
- a requirement that the person participates in specified counselling or education (but only if the person consents under proposed subsection 104.5(6)).

Minors

4.16 A control order cannot be requested, made or confirmed in relation to a person who is under 16 years of age.[24] A confirmed order cannot be made for a period longer than 3 months if the issuing court is satisfied that the person is between 16 and 18 years of age.[25] There is no prohibition on making successive control orders in relation to a person who is between 16 and 18 years of age.[26]

Key issues

4.17 Concerns were raised that the procedures governing *ex parte* interim control orders are inconsistent with the principles of natural justice and procedural fairness. That is, the Bill allows a court to impose an interim control order without giving the person concerned an opportunity to be heard.

4.18 Other key concerns included the following:

24 Proposed subsection 104.28(1).

25 Proposed subsection 104.28(2).

26 Proposed subsection 104.28(3).

- The breadth of the threshold for issuing control orders. Concerns were expressed as to whether the proposed criteria would ensure that the least restrictive means to achieve the purposes is employed. Concerns were also raised over the retrospective application of control orders to people who have trained with a listed terrorist organisation, but before the organisation was listed as a terrorist organisation and before training with it was a criminal offence.
- The adequacy of procedures to ensure a fair hearing. Concerns here included: the potential for persons to receive little prior notice of a confirmation hearing; restrictions on access to evidence upon which the order is based; the inability to call witnesses; and the absence of any right to be provided with a detailed set of reasons for the decision to issue a control order. Also raised was the need to clarify the rules of evidence that would govern applications for interim and confirmed control orders.
- The imposition of a criminal offence for any breach of a control order. Concerns were raised over the proportionality of criminalising such conduct irrespective of whether or not the breach related in some way to the preparation or commission of a terrorism act.

Thresholds

4.19 The breadth of the threshold for issuing interim and confirmed control orders was the subject of critical comment. For example, the Queensland Law Society and Queensland Bar Association argued that the first test of whether the order would substantially assist in preventing a terrorist act does not require the Court to consider whether the person to be subjected to the order is in any way involved in a possible terrorist attack:

> For example, would it be sufficient that a young person fits the profile of someone susceptible to being involved in such activities? Thus a control order can be made when there is no evidence of any planned attack and on the simple basis that on the balance of probabilities, at some time in the future there will be an attack.[27]

4.20 They also argued that proposed section 104.4 allows an order to be made if, on the balance of probabilities, the proposed subject of the order has provided or received training to or from a listed terrorist organisation even if the order is not necessary to prevent a terrorist act.[28] In their view, the test is further confused by the requirement under proposed paragraph 104.4 (1)(d) for the Court to be satisfied that the obligation, prohibitions and restrictions are reasonably necessary, appropriate and adapted for the purpose of protecting the public from a terrorist act:

> It would seem that, when the training ground is relied upon, the Court can only consider the risk to the public in fashioning the terms of the control

27 *Submission* 222, p. 13.

28 *Submission* 222, p. 12.

> order. Otherwise it must make the control order. Also, the Court can rely on training received may years beforehand.[29]

4.21 Section 101.2 of the Criminal Code makes it an offence to knowingly or recklessly provide or receive training where the training is connected with preparation for the engagement of a person in, or assistance in a terrorist act. By contrast, training for the purpose of Division 104 of the Bill is not defined. Australian Lawyers for Human Rights argued that:

> Training may include a person who receives religious training from such an organisation but the person trained is not directly involved in specific training about violence or a terrorist act. The provision does not contemplate a person who has received non-violent training but presents no risk in terms of committing a terrorist act. No risk may be posed by the person who is misled (naively or otherwise) into training but realised its nature and left the training immediately. The control measures arguably allow for an inference to be made that because the person has received training the public will necessarily need to be protected. [30]

Reasonable necessity and proportionality of restrictions

4.22 The Department pointed to the Bill's requirement that the Court take into account the impact of the restriction, prohibition or obligation on the individual. This, it argued, would provide a sufficient discretion to ensure that the terms of any control order are proportionate and do not violate fundamental human rights.[31]

4.23 The issue of proportionality was raised by the ACT Human Rights Commissioner, who has noted the following concern of the Council of Europe's Commissioner for Human Rights:

> Control orders are intended to substitute the ordinary criminal justice system with a parallel system run by the executive … What is essential is that the measures themselves are proportionate to the threat, objective in their criteria, respectful of all applicable rights and, on each individual application, justified on relevant, objective, and not purely racial or religious grounds.'[32]

4.24 HREOC considered that, as with preventative detention orders, a stricter proportionality test is appropriate for control orders. HREOC stated a clear preference for including an explicit requirement in the Bill that the issuing Court consider whether there are less restrictive means of achieving the relevant purpose (that is,

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29 *Submission* 222, p. 12.

30 *Submission 139*, p. 12.

31 *Supplementary Submission* 290A, p. 5.

32 Council of Europe, Office of the Commissioner for Human Rights, Report by Mr Alvaro Gil Robles, Commissioner for Human Rights, on his visit to the United Kingdom, 4-12 November 2004, 8 June 2005, pp. 10-12, reported in advice of the ACT Human Rights Commissioner, 19 October 2005, p. 12.

protect the public from a terrorist act).[33] A stricter proportionality test will, in HREOC's view, reflect the exceptional nature of a control order and provide an appropriate counterweight to the Bill's existing tests (which can be relatively easily satisfied).[34]

Retrospectivity

4.25 Witnesses also raised concerns about the retrospective aspect of the Bill. An argument here was that there is an inherent unfairness in imposing 'sanctions' on a person for conduct which may have taken place many years before and before an organisation was listed:

> As it stands the provision may be criticised because it effectively punishes a person retrospectively for an act ... which was not illegal at the time of commission and the person poses no current risk.[35]

Right to a fair hearing

4.26 Many witnesses raised concerns about the procedures for issuing interim and confirmed control orders. It was argued that:

- a criminal standard of proof and the minimum guarantees that exist in criminal trials should apply; or
- the requirements that apply in civil and public law matters to ensure a fair hearing should apply.

4.27 The Department advised that it considered that:

> The making of a control order does not equate to a determination of a criminal charge or of the rights and obligations in a suit at law of the person subject to the order.[36]

4.28 On this view, articles 14.1 and 14.3 of the ICCPR are not engaged by the procedure for issuing a control order. These require that a person is entitled to a fair and public hearing before an impartial and independent court.

4.29 On the question of ensuring parties to control order proceedings enjoyed 'equality of arms', the Department advised that challenges to legality of a control order will be heard by a court both before the control order is confirmed and later when it may be in force. The Bill contains no restriction on the conduct of these proceedings (except in so far as national security may be at risk). It also provides that the person subject to an order may also seek revocation of the order once it is confirmed.[37]

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33 *Submission 158*, p. 24.

34 *Submission 158*, p. 8.

35 Australian Lawyers for Human Rights, *Submission 139*, p. 12.

36 *Supplementary Submission 290A*, p. 5.

37 *Supplementary Submission 290A*, p. 5.

4.30 There are a number of aspects to proceedings for control orders which appear to fall short of the basic requirement of a fair hearing (in civil matters or criminal) and which could be rectified without disrupting the overall aim or effectiveness of the scheme. The committee notes in this regard the advice of the AFP that it did not mind how significant the safeguards are in this legislation so long as its operational capacity was not unduly hindered.[38]

4.31 The features of the procedure which attract particular comment are as follows:

- the requirement for *ex parte* proceedings in all cases of interim control orders;[39]
- the lack of any time limit on interim orders obtained *ex parte* and the possibility of only 48 hours notice being given in respect of a hearing to confirm an interim order;[40]
- the lack of an express right to call witnesses;[41]
- the possibility of reliance on hearsay evidence to obtain a control order;
- restrictions on the right to reasons and the evidence that is available.[42]

Ex parte hearings

4.32 The Bill provides for *ex parte* hearings in respect of all applications for a control order. It does not reserve *ex parte* hearings only for those cases which require a degree of urgency. This has been criticised as unnecessary and disproportionate. Professors Charlesworth and Byrne suggested, for example, that:

> As is currently done for domestic violence orders, an interim order could be made at an inter partes application (unless there is good reason to make an *ex parte* application), and then a date set for a final *inter partes* hearing to confirm the orders.[43]

4.33 Submitters agreed that *ex parte* hearings may be appropriate in some circumstance; for example, where there are grounds for believing that a person would abscond if he or she had notice of an intended order.[44] It has been pointed out that control orders were introduced in the UK in response to a House of Lords' judgment that rejected indefinite detention of non nationals as discriminatory and a violation of

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38 Deputy Commissioner Lawler, *Committee Hansard*, 17 November 2005, p. 2.

39 Proposed section 104.4.

40 Proposed section 104.4

41 Proposed section 104.14.

42 Proposed subsection 104.13(2).

43 *Submission 206*, p. 13.

44 Human Rights Office, *Submission 154*, p. 11; Professor Charlesworth, Professor Byrne, Ms Mackinnon, *Submission 206*, p.4, p. 13.

the fundamental right to liberty.[45] The UK Parliamentary Joint Committee on Human Rights has criticised the lack of an adversarial procedure before control orders are issued, but this issue has yet to be tested before the UK courts. This process will involve an assessment of the UK provisions against the standards of the *Human Rights Act 1998* (UK).[46]

Time limits and notice of hearing

4.34 There is no limit to the period in which an interim control order may be in force. The Bill does provide that the order must be confirmed at a subsequent hearing, which must be held within 12 months of the date on which the interim order was issued. Witnesses have highlighted the distinction between the Bill and provisions for an interim control order under the *Terrorism Act 2000* (UK), which limits the period of an interim order to 7 days.

4.35 The Department advised that a specific time limit had not been included in the Bill as it is normal to leave it to the discretion of the Court to determine the hearing date.[47] The Department put the view that imposing a time limit may unnecessarily limit the court. However, it agreed that a requirement of 'as soon as practicable' may be a workable qualification.[48] This would indicate to the Court the importance of expediting the hearing.

4.36 Concerns were also raised over the requirement to serve the order at least 48 hours before the day set for the confirmation hearings. The concern here was that this may leave open the possibility of insufficient notice and may result in an unnecessary interference with the right to a fair hearing. It is presumably for these reasons that a notice period of three days has been held to be insufficient under the European Convention on Human Rights.[49] It has been suggested that comprehension of the order and its implications is likely to be more difficult for people with limited literacy levels or who do not read the English language. Similar concerns have been raised in relation to domestic violence orders by the Victorian Law Reform Commission.[50]

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45 See *A (FC) and other (FC) v Secretary of State for the Home Department* [2004] UKHL 56 at para 95. The Court in that case rejected a government claim that indefinite detention of a non national was justified. The Court acknowledged the threat of terrorism, but rejected the UK's derogation from the European Convention on Human Rights on the grounds that the UK is not at war and does not face a 'public emergency that threatens the life of the nation'.

46 Lauterpacht Centre for International Law, *Submission 240*, p. 2. See also Joint Committee on Human Rights, Prevention of Terrorism Bill, Tenth Report of Session 2004-05, HL Paper 68; HC 334, p. 5 available at www.publications.parliament.uk/pa/jt200405/jselect/jtrights/68/68.pf

47 *Committee Hansard*, 18 November, p. 31

48 *Committee Hansard,* 18 November, p. 31

49 *Rada Cavanilles v Spain* RJD 1990-VIII 3242 referred to in *Submission 154*, p. 13.

50 *Submission 154*, p. 13; see also Victorian Law Reform Commission, Review of Family Violence Laws, 2004.

No right to call witnesses

4.37 As noted above, proposed subsection 104.14(1) limits the persons who may appear at a subsequent *inter partes* hearing to confirm the control order.[51]

4.38 It was argued that these limitations on who may adduce evidence and make submissions will have an adverse impact on the ability of the subject of the order to have real and effective access to the Court. That is, the principal of 'equality of arms' requires an adequate and proper opportunity for the respondent to challenge and question witnesses against him or her.

Rules of evidence

4.39 Concerns were raised during the hearings over the application of the *Evidence Act 1995* (Cth) (the Evidence Act) to proceedings concerning applications for control orders, and over the possible reliance on hearsay evidence to obtain a control order. As noted earlier, a difference of opinion emerged during the hearings about whether subsequent hearings to confirm, vary or revoke a control order were interlocutory or would be treated as trial proceedings for the purpose of the Evidence Act.[52]

4.40 The Department advised the Committee that an *ex parte* application for an interim control order would be regarded as interlocutory proceedings for the purposes of the Evidence Act. Confirmation hearings would be regarded as 'proceedings in a federal court' for the purposes of that Act. Accordingly, subsection 4(1) of that Act would mean that its provisions would apply to both applications for interim control orders and confirmation hearings.[53]

4.41 It is possible that hearsay evidence could be relied on in hearings for the issue of an interim control orders and in confirmation hearings. As a general rule, hearsay evidence is inadmissible in trial proceedings. However, there are a number of exceptions that could apply resulting in hearsay being accepted.[54] Section 75 of the Evidence Act also provides that the hearsay rule does not apply to 'interlocutory proceedings' if the party adducing evidence also adduces evidence of its source.

4.42 During the hearings, it was suggested that the Bill could be amended to clarify that hearsay evidence is not receivable in proceedings to confirm a control order.[55] The Department agreed that the exclusion of hearsay evidence would not present the Department with any difficulty.

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51 Proposed subsection 104.14(1).

52 See, for example, *Committee Hansard*, 17 November 2005, p. 82.

53 Attorney General Department, *Submission 290*, p. 2.

54 Evidence Act, Division 1 to 3, Part 3.2.

55 See discussion, *Committee Hansard*, 18 November 2005, p. 28.

Restriction on right to reasons and access to evidence

4.43 As noted in Chapter 3, submitters and witnesses argued that a full statement of reasons was critical to exercising the right to challenge a control order (and a preventative detention order). Mr Bret Walker SC expressed the view the current provisions provide no guarantee that the summarised information would reflect all the grounds upon which the issuing authority had granted the order. It was noted that:

- information in relation to facts is provided to the issuing authority without the need for the information or the facts to be admissible evidence;
- the issuing authority can require further information and is required to exercise independent consideration of the facts;
- orders are not required to set out the grounds on which the order is made;
- information additional and perhaps different to information originally thought to constitute reasonable grounds may be the actual basis for the order;
- summarising the grounds is left to the AFP and not the issuing authority; and
- the judgement about and omission of information likely to prejudice national security is made by the police.[56]

4.44 The committee was advised that:

> Without any need for alarmist or inappropriate slurs against members of the AFP or lawyers advising them, it is easy to see that in practice the contexts of a critical document, viz the summary of the grounds to be served on the person against whom an order has been made, may well not accurately represent the real reason why the order was made.[57]

4.45 Mr Walker stressed to the Committee the importance of practising lawyers being confident of the grounds upon which their client has been subjected to the order in order to advise them properly. Additionally, judicial proceedings for review of orders require evidence rather than warrant style 'information'. This makes it essential that the statement be a full statement of grounds produced by the issuing authority itself and any redactions or omission for national security reasons be the result of the independent and recorded decision of an issuing Court.[58]

4.46 This view was shared by the Queensland Law Society and Queensland Bar Association.[59]

4.47 During hearings, the Committee explored with witnesses the possibility of expanding the obligation to require the material upon which the order is based being

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56 Mr Bret Walker SC, *Submission 194*, p. 3.

57 *Submission 194*, p. 3.

58 *Submission 194*, p. 3.

59 *Submission 222*, p. 21.

given to the person subject to the order.[60] HREOC argued that, if a summary of grounds - rather than full reasons - is to be retained, the Bill should specify that the summary must be prepared by the issuing authority as opposed to an AFP officer. Mr Walker SC also suggested that the provision of the ADJR Act would be an appropriate model. It provides for the provision of a statement of reasons, including the material which provides the basis for the decision in question.[61]

Extent of restrictions

4.48 Many witnesses expressed their concern about the extent of restrictions capable of being imposed under a control order:

> The terms of control orders may include restrictions and prohibitions on a person's movements, activities, work, travel, communication (eg telephone and internet), association, possession or use of certain articles or substances, and requirements to report to specified persons and places, submit to counselling, home detention, and being photographed and fingerprinted, and use of electronic tracking devices. These restrictions are much more extensive than those available under current State and Territory legislation governing apprehended violence orders. They infringe human rights under the ICCPR by restricting travel (freedom of movement – article 12(1)) and by imposing tagging devices (privacy and reputation - article 17(1)). By limiting membership of groups or associations control orders can restrict both the right to association (article 22) and the right to freedom of religion (article 18). They can also restrict access to information and limit internet use, which can be in breach of the right to freedom of expression (article 19 (2)). Control orders subjecting the person to house arrest also engage the right to liberty in article 9.[62]

4.49 Concerns were raised that restrictions under a control order could prove more onerous than imposition of a criminal penalty, especially where those restrictions are imposed over a lengthy period of time. The Bill does not make any distinction between control orders that impose less onerous restrictions and those that impose restrictions which might be regarded as 'higher end' sanctions. A particular concern here was that prohibitions and restrictions that impose home detention or place severe restrictions on freedom of movement could be characterised as a deprivation of liberty without trial.

4.50 The committee is aware that Ben Emmerson QC, a leading UK human rights barrister, has opined that UK control orders which impose significant deprivations of liberty and other severe restrictions are liable to be classified as criminal penalties and,

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60 *Committee Hansard,* 14 November 2005, p. 71.

61 *Committee Hansard*, 17 November 2005, p. 84.

62 ACT Human Rights Commissioner, *Submission 154*, p. 11.

thereby, attract the right to fair trial under Article 6 of the European Convention on Human Rights.[63]

4.51 The ACT Human Rights Office argued that the Bill's penalty of 5 years imprisonment for the breach of a control order supports the interpretation of these orders as 'criminal' rather than 'civil' in nature for the purpose of human rights protection. The Office noted that the House of Lords has held that, in assessing anti-social behaviour orders (which are similar in nature, but less onerous):

> there are good reasons, in the interests of fairness, for applying a higher criminal standard to these orders where allegations are made of a criminal or quasi criminal conduct which, if proved, would have serious consequences for the person against whom they were made.[64]

No limitation on the number of successive control orders

4.52 The Bill provides that a control order may be made for up to 12 months and may be repeated without limit against the same person.[65] Witnesses pointed out that this contrasts with the limits imposed on control orders issued under equivalent UK laws. The UK laws provide that control orders may be made for up to 12 months at a time, except those which impose 'house arrest'. The latter are limited to 6 months duration. The renewal of 'house arrest' orders is limited to a maximum period of 6 months on each occasion.

The Committee's view

4.53 The committee acknowledges the significant level of concern raised in submissions and evidence with respect to the Bill's provision's relating to control orders, particularly those relating to the need for strong procedural safeguards. At the same time, the committee must have regard to the fact that the purpose of the proposed regime is to protect the community and is the result of exceptional circumstances.

4.54 After careful consideration, the committee agrees that there is a need to strengthen the safeguards governing control orders. In reaching this view, it noted the above-mentioned advice from the Australian Federal Police that it had no difficulty with the inclusion of additional safeguards which would not unduly undermine their operational capacity to respond to the terrorist threat.

4.55 In light of the above, the committee makes the following recommendations.

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63 Emmerson, B, The Prevention of Terrorism Act: Legal Opinion (2005) available at www.statewatch.org; in A Chong et al, *Laws For Insecurity? A report on the Federal Government's proposed counter-terrorism measures,* 23 September 2005, referred to in *Submission 142*, p. 14.

64 See, for instance, *Clingham v Royal Borough of Kensington and Chelsea* [2003] 1 AC 787.

65 Proposed para. 104.4(1)(d) and subsection 104.4(2).

Recommendation 19

4.56 The committee recommends that proposed sections 104.2, 104.4, 104.7-9 and 104.14 be amended to include a requirement that the AFP officer, the Attorney General and the issuing Court each be satisfied that the application and making of the control order and the terms in which it is sought and issued is the least restrictive means of achieving the purpose of the order.

Recommendation 20

4.57 The committee recommends that proposed section 104.5 be amended to require that the day of the hearing to confirm, vary or revoke the order must be set as soon as is reasonably practicable after the making of the order.

Recommendation 21

4.58 The committee recommends that proposed section 104.12 be amended to require police officers to arrange access to a detainee by a lawyer and an interpreter, as necessary, in cases where there are reasonable grounds to believe that the detainee is unable to understand fully the effect of control order because of an inadequate knowledge of the English language or a mental or physical disability.

Recommendation 22

4.59 The committee recommends that the Bill be amended to prohibit reliance on hearsay evidence in a proceeding for the grant of continued control order.

Recommendation 23

4.60 The committee recommends that proposed section 104.12 be amended to provide that the detainee shall be provided with a copy of the order and the reasons for the decision, including the materials on which the order is based, subject to any redactions or omissions made by the issuing authority on the basis that disclosure of the information concerned is 'likely to prejudice on national security' (as defined in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth))

Recommendation 24

4.61 The committee recommends that proposed section 104.29 be amended to require the Attorney-General to report to the Parliament on control orders on a six monthly basis.

Recommendation 25

4.62 The committee recommends that the Bill be amended by inserting an express requirement for a public and independent 5 year review of the operation of Division 104, adopting the same mechanism and similar terms to that provided by section 4 of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), which established the Sheller Committee.

Recommendation 26

4.63 The committee recommends that proposed section 104.32 be amended to provide a sunset period of five years.

CHAPTER 5

SEDITION AND ADVOCACY

Introduction

5.1 This chapter will outline the key provisions and issues raised in relation to the following two aspects of the Bill:

- the proposed sedition offences (Schedule 7 of the Bill); and
- the extension of the power to proscribe terrorist organisations under the Criminal Code to include organisations that advocate the doing of a terrorist act (Schedule 1 of the Bill).

5.2 The committee notes at the outset that the Attorney-General has committed, in his second reading speech, to review the sedition provisions in the future:

> The sedition amendments are modernising the language of the provisions and are not a wholesale revision of the sedition offence.
>
> However, given the considerable interest in the provisions, I would like to assure this House that I will undertake to conduct with my department a review of the sedition offences.[1]

5.3 It is not entirely clear from this speech whether the advocacy provisions in Schedule 1 would be included in this review. However, a representative of the Attorney-General's Department (Department) indicated that it was his understanding that the advocacy provisions would be 'looked at as well'.[2]

Sedition - outline of key provisions

Offence of sedition

5.4 Schedule 7 of the Bill proposes to repeal existing sedition offences in sections 24A to 24E of the *Crimes Act 1914* (Crimes Act). Instead, the Bill will insert updated sedition offences into Part 5.1 of the Criminal Code (which currently provides for treason offences). According to the Explanatory Memorandum:

> The inclusion of sedition in the Criminal Code is consistent with the general policy of moving serious offences to the new Criminal Code when they are updated. These offences have been update[d] in line with a number of recommendations of Sir Harry Gibbs in the Review of Commonwealth Criminal Law, Fifth Interim Report, June 1991 (the Gibbs Report).[3]

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1 The Hon Philip Ruddock MP, *House of Representatives Hansard,* 3 November 2005, p. 67.

2 *Committee Hansard*, 14 November 2005, p. 8.

3 p. 88.

5.5 Proposed section 80.2 of the Criminal Code sets out five new offences of sedition as follows:

- urging another person to overthrow by force or violence the Constitution or Government (subsection 80.2(1));[4]
- urging another person to interfere by force or violence in parliamentary elections (subsection 80.2(3));[5]
- urging a group or groups (whether distinguished by race, religious, nationality or political opinion) to use force or violence against another group or groups, where that would threaten the peace, order and good government of the Commonwealth (subsection 80.2(5));[6]
- urging another person to assist, by any means whatever, an organisation or country that is at war with the Commonwealth (whether declared or undeclared) (subsection 80.2(7)); and
- urging another person to assist, by any means whatever, those engaged in armed hostilities with the Australian Defence Force (subsection 80.2(8)).

5.6 Under proposed section 80.2, the standard of 'recklessness' would apply to the certain elements of the various offences. For example, in relation to the offence of interference with parliamentary elections, the standard of recklessness applies to the element that the interference is with lawful processes for election to a House of the Parliament.[7]

5.7 Each offence has a proposed maximum penalty of imprisonment for 7 years. This compares with the current penalty of 3 years for the existing sedition offences in the Crimes Act.[8]

Defences

5.8 Proposed section 80.3 provides a defence to the offences in sections 80.1 (relating to treason) and 80.2 (relating to sedition) for certain acts done in 'good faith'.[9] According to the Explanatory Memorandum:

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4 The Explanatory Memorandum suggests that this offence 'is similar in effect to paragraph 24A(d) and section 24D of the Crimes Act': p. 89.

5 The Explanatory Memorandum states 'this is a new aspect of the offences recommended by the Gibbs Report': p. 90.

6 The Explanatory Memorandum states that 'new subsection 80.2(5) modernises the language [of the current Crimes Act offences] from classes or groups as recommended by the Gibbs Report': p. 90.

7 Proposed subsection 80.2(4), Explanatory Memorandum, p. 90; see also proposed subsections 80.2(2) and 80.2(6). Section 5.4 of the Criminal Code defines 'recklessness'.

8 Explanatory Memorandum, pp 89-90.

9 Note that the Bill does not define 'good faith'.

> This section effectively mirrors the defence of good faith contained in section 24F of the Crimes Act, which applied to the sedition offences in that Act, and the treason offence in section 80.1 of the Criminal Code…The only substantive difference between section 24F of the Crimes Act and new section 80.3 of the Criminal Code is that the new provision gives more discretion to a court in considering whether an act was done in good faith.[10]

5.9 The defendant would bear the evidential burden in relation to the defence for acts done in good faith (see the note to new subsection 80.3(1)).

5.10 Proposed subsection 80.2(9) also provides a defence for the offences under subsections 80.2(7) and 80.2(8) for conduct for the purposes of the provision of aid of a humanitarian nature. Again, the defendant would bear the evidential burden in relation to this defence (see the note to new subsection 80.2(9)).

Other aspects

5.11 Other aspects of the amendments in Schedule 7 include:

- extended geographical jurisdiction (section 80.4) – the application of Division 80 extends to conduct which occurs outside Australia, and in relation to any person, whether or not they are an Australian resident or citizen;
- proceedings for an offence against Division 80 must not be commenced without the Attorney-General's written consent (section 80.5); and
- provision for concurrent operation of state and territory laws (section 80.6).

Seditious intention and unlawful associations

5.12 Finally, Item 4 of Schedule 7 of the Bill proposes to include a 'modernised' version of the definition of 'seditious intention' in subsection 30A(3) of Part IIA of the Crimes Act. According to the Explanatory Memorandum, this is a consequential amendment that 'maintains the substance of the existing definition of seditious intention', which is removed because of the repeal of section 24A of the Crimes Act.[11] Existing paragraph 30A(1)(b) of the Crimes Act provides that an 'unlawful association' includes any body which advocates or encourages the doing of any act having, or purporting to have, as an object the carrying out of a 'seditious intention'. New subsection 30A(3) will update the definition of 'seditious intention' to mean:

- bring the Sovereign into hatred or contempt;
- urge disaffection against the Constitution, the Commonwealth Government or either House of the Parliament;
- urge another person to attempt to procure a change, otherwise than by lawful means, to any matter established by law of the Commonwealth; or

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10 p. 91.

11 p. 87.

- promote feelings of ill-will or hostility between different groups so as to threaten the peace, order and good government of the Commonwealth.

Sedition – key issues

5.13 This section will first outline the general reaction to the sedition provisions in submissions and evidence received by the committee. This is followed by a discussion of key issues raised in relation to the proposed sedition offences including:

- the Attorney-General's proposed review of the sedition offences;
- background and history of sedition (including the Gibbs Report);
- the need for sedition laws;
- freedom of speech issues;
- specific issues, including fault elements and links to violence;
- proposed defences, safeguards and penalties; and
- the 'unlawful associations' provisions.

General reaction

5.14 Submissions and evidence received by the committee were overwhelmingly opposed to the sedition provisions in Schedule 7 of the Bill. The critics of these provisions came from a broad range of organisations and individuals, including a large number who expressed concern about the impact of the provisions on their professions, particularly media organisations[12] and members of the arts and entertainment industry.[13] As with the advocacy and other provisions of the Bill, submissions suggested that these amendments would have a particular impact on the Muslim community.[14]

5.15 In addition, as Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, told the committee:

> The sedition provisions have now been opposed publicly by over 30 senior and eminent lawyers, legal academics and retired judges. You may have noted that the editorials in both the *Australian* and the *Age* have now called

12 See, for example, APC, *Submission 143*; Australian Centre for Independent Journalism, *Submission 184*; Special Broadcasting Service Corporation (SBS), *Submission 164*; ABC, *Submission 196*; Free TV Australia, *Submission 149*; Fairfax and others, *Submission 88.*

13 See, for example, Australian Publishers Association, *Submission 151*; Representatives of the Arts and Creative Industries of Australia, *Submission 153*; National Association for the Visual Arts (NAVA), *Submission 166;* Australian Screen Directors Association, *Submission 146*; Media, Entertainment and Arts Alliance, *Submission 198;*and see also the National Tertiary Education Union (NTEU), *Submission 159*, for the potential impact on academics.

14 See, for example, Dr Ben Saul, Gilbert and Tobin Centre of Public Law, *Committee Hansard*, 14 November 2005, p. 60; Dr Waleed Kadous, AMCRAN, *Committee Hansard*, 17 November 2005, p. 22 and AMCRAN, *Submission 157*, p. 29.

> for their removal. Additional support has come from three state premiers, territory leaders and backbenchers on all sides of politics.[15]

5.16 John Fairfax Holdings Limited, News Limited, Western Australian Newspapers Limited, the Australian Press Council (APC) and AAP (Fairfax and others) described the sedition provisions as 'the gravest threat to publication imposed by the Government in the history of the Commonwealth'.[16]

5.17 The Gilbert and Tobin Centre of Public Law, despite raising numerous concerns in relation to the sedition provisions, noted that the provisions had some positive features. For example, it acknowledged that the Bill 'simplifies the convoluted existing law of sedition, and narrows it in some respects' and that:

> The new sedition offences avoid the vague and oppressive concepts in the existing law of exciting 'disaffection', promoting feelings of 'ill-will', or 'contempt' of the Sovereign. Anyone who supports a republic could be prosecuted under existing law.[17]

5.18 However, Dr Ben Saul of the Gilbert and Tobin Centre of Public Law qualified these comments during the committee's hearings:

> A modernised law of sedition is better than an older one, which may not be as appropriate to modern circumstances, but our view is that sedition offences are unnecessary and should be taken out of the bill.[18]

5.19 Further, other submissions were concerned that, in 'modernising' the law of sedition, the provisions extend its scope in many ways.[19] For example, Mr John North, President of the Law Council of Australia (the Law Council), told the committee that the sedition offences had been broadened:

> …to such an extent that we think they will accidentally catch members of the media and…legitimate protesters and even peace activists. And the moment Australia moves down that path then we really are in trouble.[20]

5.20 The Castan Centre for Human Rights Law took a slightly different approach, welcoming the repeal of the sedition offences in the Crimes Act, stating that this was:

> …a significant step forward in protecting freedom of political speech in Australian law, and bringing Australia further into line with its obligations

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15 *Committee Hansard*, 17 November 2005, p. 3.

16 *Submission 88*, p. 6.

17 *Submission 80*, p. 18; see also Mr Cameron Murphy, NSW Council for Civil Liberties, *Committee Hansard*, 17 November 2005, p. 31.

18 *Committee Hansard*, 14 November 2005, p. 66.

19 See, for example, Mr Laurence Maher, *Submission 275A*, p. 16; Mr Chris Connolly, *Submission 56*, p. 13; Australian Screen Directors Association, *Submission 146*, pp 2-3; Representatives of the Arts and Creative Industries of Australia, *Submission 153*, p. 5.

20 *Committee Hansard*, 14 November 2005, p. 80.

> under international human rights instruments, notably article 19 of the ICCPR and article 19 of the Universal Declaration of Human Rights.[21]

5.21 However, its support was nevertheless qualified by its concerns about the impact of Schedule 7 on freedom of expression (which is discussed further below).[22]

5.22 Finally, Mr Chris Connolly argued that Schedule 7 of the Bill:

> …is a dangerous proposal that re-awakens an ancient and oppressive law in Australia. Sedition law is the sleeping giant of authoritarianism, and it has the potential to inhibit free speech and restrict open democracy.[23]

5.23 Many of these submissions suggested that Schedule 7 should be removed from the Bill altogether.[24] For example, Mr Jack Herman of the APC told the committee that:

> ….there are sections of the sedition law that are wider than the antiterrorism bill itself, inasmuch as they do address supposed offences which are, by their nature, not urging violence or not by violent means, which we would say is what a terrorism bill should be catching. So in that sense we do not think schedule 7 fits very well into this bill, and can be removed from it without damage to the main aim of the bill.[25]

Proposed review of the offences

5.24 As outlined above, the Attorney-General committed in his second reading speech to review the sedition offences in the future.[26] Submissions generally welcomed this review.[27] At the same time, many queried why Schedule 7 of the legislation should be passed *before* the review takes place, and suggested that

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21 *Submission 114*, p. 27; see also Mr Ibrahim Abraham, Castan Centre for Human Rights Law, *Committee Hansard*, 14 November 2005, pp 51-52.

22 *Submission 114*, p. 27; see also Mr Ibrahim Abraham, Castan Centre for Human Rights Law, *Committee Hansard*, 14 November 2005, pp 51-52.

23 *Submission 56*, p. 3.

24 See, for example, Professor Kenneth McKinnon, APC, *Committee Hansard*, 17 November 2005, p. 2 and *Submission 143*, p. 4; Mr Robert Connolly, Representatives of the Arts and Creative Industries of Australia, *Committee Hansard*, 17 November 2005, p. 3; Mr Cameron Murphy, *Committee Hansard*, 17 November 2005, p. 31; ALHR, *Submission 139*, p. 20; Mr Laurence Maher, *Submission 175A*, p. 1.

25 *Committee Hansard*, 17 November 2005, p. 8.

26 The Hon Philip Ruddock MP, *House of Representatives Hansard,* 3 November 2005, p. 67. Note that it appears from departmental evidence that the advocacy provisions in Schedule 1 will be included in this review: the discussion in this section could therefore apply equally to the advocacy provisions.

27 See, for example, Mr Ibrahim Abraham, Castan Centre for Human Rights Law, *Committee Hansard*, 14 November 2005, p. 52; and Castan Centre for Human Rights Law, *Submission 114*, p. 26; Australian Screen Directors Association, *Submission 146*, p. 2; Free TV Australia, *Submission 149*, p. 2; NAVA, *Submission* 166, p. 3.

Schedule 7 should be removed from the Bill altogether, pending this review.[28] For example, the ACT Chief Minister, Mr Jon Stanhope, observed that:

> …to suggest that we will legislate now and review later does seem to me to be a less than rigorous approach to law reform on such a fundamentally important issue.[29]

5.25 PIAC expressed the view that:

> It is completely unacceptable that a government should propose to pass into law provisions that it knows before their passage into law warrant a review.[30]

5.26 Similarly, Professor Kenneth McKinnon of the APC suggested that to enact the sedition provisions, then review them later, would be putting the 'cart before the horse'.[31]

5.27 The Law Council believed that:

> …it is bad policy to introduce flawed legislation creating serious criminal offences for which offenders face terms of imprisonment when some doubt obviously exists about its appropriateness. The Law Council recommends that the existing sedition laws be reviewed to determine the need to have them in view of the number of new terrorist offences introduced. The new provisions ought to be deferred pending that review.[32]

5.28 In the same vein, Dr Ben Saul of the Gilbert and Tobin Centre of Public Law observed that:

> From a law reform perspective it makes much more sense to subject this to a more rational process of law reform, not in the heat of a very long and detailed antiterrorism bill.[33]

5.29 Indeed, the Gilbert and Tobin Centre of Public Law suggested that, if the sedition and advocacy offences are to be reviewed, the review should:

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28 See, for example, Mr Jon Stanhope, ACT Chief Minister, *Committee Hansard*, 17 November 2005, p. 90; APC, *Submission 143*, p. 3; NAVA, *Submission 166*, p. 3; Media, Entertainment and Arts Alliance, *Submission 198*, p. 4; PIAC, *Submission 142*, p. 41; Law Council, *Submission 140*, p. 23; Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 16; AMCRAN, *Submission 157*, p. 29.

29 *Committee Hansard*, 17 November 2005, p. 95.

30 *Submission 142*, p. 41; see also Ms Jane Stratton, PIAC, *Committee Hansard*, 14 November 2005, pp 36 and 39.

31 *Committee Hansard*, 17 November 2005, p. 9.

32 *Submission 140*, p. 23.

33 *Committee Hansard*, 14 November 2005, p. 66.

- be independent of the government, either by referring the matter to the Australian Law Reform Commission (ALRC),[34] an independent expert committee, or to a parliamentary committee;
- consider all security offences in both the Crimes Act and the Criminal Code, 'since many offences overlap and some are redundant';
- consider the proper scope of defences to sedition, and the possibility of extending good faith defences to any other security offences that might be retained;
- consider the need for, and scope of, all security offences in light of the express constitutional protection of freedom of religion (section 116 of the Constitution), the implied freedom of political communication, and human rights standards on freedom of expression and association.[35]

5.30 Others noted the importance of public consultation as part of the review.[36]

5.31 In response to the committee's questions as to why Schedule 7 should be passed now if there is a need to review them, a representative of the Department suggested that Schedule 7 is:

> …an important component of this bill. Some of the urging of violence which is contained in the sedition offence is linked to preventing terrorist attacks. Consequently, government has given priority to it.[37]

5.32 In this context, the Department further submitted that:

> The Attorney-General recognises that the time to discuss the sedition offence and related issues such as Part IIA of the Crimes Act has been limited. Allowing for further consideration of the issues later does not mean the offence is not needed or suitable to enact now.[38]

Background and history of sedition – an archaic, 'dead letter' law?

5.33 Many submitters described laws of sedition as 'archaic' or 'outdated', and argued that Schedule 7 of the Bill would reinvigorate and legitimise archaic sedition laws that are not appropriate in a modern democracy. Many of these also pointed to

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34 See also Dr David Neal, *Submission 247*, p. 11.

35 *Submission 80*, p. 16; see also Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, *Committee Hansard*, 17 November 2005, p. 4.

36 See, for example, Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, *Committee Hansard*, 17 November 2005, p. 4.

37 *Committee Hansard*, 14 November 2005, p. 8 and also p. 22.

38 *Submission 290A*, Attachment A, p. 20.

the troubled history of sedition laws around the world, arguing that they are 'heavily politicised' and have 'a history of abuse'.[39]

5.34 Mr Laurence Maher submitted that he had in the past advocated the repeal of the existing sedition provisions under the Crimes Act because they are:

> …archaic and unnecessary and, more importantly, contrary to contemporary modern democratic principle as an unjustifiable burden on freedom of expression and freedom of association.[40]

Sedition around the world

5.35 Mr Chris Connolly submitted that 'sedition has a long and undignified history', and that important figures in history who have been charged and sometimes imprisoned for sedition, include both Ghandi and Nelson Mandela.[41] He argued that:

> …sedition charges are either the last desperate gasp of an authoritarian regime (eg Ghandi) or the extreme and sometimes ludicrous result of a regrettable moment in national history (eg McCarthyism).[42]

5.36 Mr Chris Connolly concluded:

> The clear lesson from the history of sedition laws is that they are used routinely by oppressive regimes, or are used by more liberal regimes at times of great national stress. Their use is nearly always the subject of considerable regret at a later date.[43]

5.37 In the same vein, Mr Laurence Maher observed that a survey of the history of sedition demonstrates that (among other matters) 'its only purpose and use has been to throttle political dissent'.[44]

5.38 The committee was told that many other countries have been moving away from crimes of sedition. For example, the Gilbert and Tobin Centre of Public Law submitted that:

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39 See, for example, Mr Chris Connolly, *Submission 56*, pp 3 and 16; Gilbert and Tobin Centre of Public Law, *Submission 80,* pp 18-19; Australian Screen Directors Association, *Submission 146*, p. 2; Media, Entertainment and Arts Alliance, *Submission 198*, pp 4-5; Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, *Committee Hansard*, 17 November 2005, p. 4; Mr David Bernie, NSW Council for Civil Liberties, *Committee Hansard*, 17 November 2005, p. 32; APC, *Submission 143*, pp 2-3; Mr Laurence Maher, *Submission 275*, p. 2 and *Submission 275A*, p. 3.

40 *Submission 275*, p. 2 and *Submission 275A*, p. 1; see also Laurence Maher, 'The Use and Abuse of Sedition' (1992) 14 *Sydney Law Review* 287-316; Laurence Maher, 'Dissent, Disloyalty and Disaffection: Australia's Last Cold War Sedition Case' (1994) 16 *Adelaide Law Review* 1-77.

41 *Submission 56*, p. 9 and see also p. 18.

42 *Submission 56*, p. 9; see also Media, Entertainment and Arts Alliance, *Submission 198*, p. 4.

43 *Submission 56*, p. 9.

44 *Submission 275A*, p. 3.

> The Gibbs review observed that the UK Law Commission found that a crime of sedition was unnecessary, since seditious conduct is already captured by the ordinary offence of incitement to crime. Reviews of criminal law in Canada and New Zealand omitted sedition offences altogether.[45]

5.39 Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, highlighted the application of sedition laws outside Australia, telling the committee that:

> The countries that have repealed sedition laws, or made them inactive, are: Canada, Ireland, Kenya, New Zealand, South Africa, Taiwan, the United Kingdom and the United States. The countries that have active sedition laws that have been used or revised in recent years are: China, Cuba, Hong Kong, Malaysia, North Korea, Singapore, Syria and Zimbabwe. I imagine that it is perfectly clear to the majority of Australians which list we feel Australia should belong to.[46]

5.40 Similarly, Mr David Bernie of the NSW Council for Civil Liberties suggested that:

> Sedition is something that has generally been used by totalitarian and authoritarian regimes. It no longer has a place in democracy. Most democracies have done away with sedition laws.[47]

5.41 However, the Department submitted that:

> While some have commented on a trend in some other countries away from 'sedition' offences, this appears to be an observation in relation to the naming of such offences, rather than an observation that the substance of such offences are being removed from the Statute books.[48]

5.42 The Department further pointed to relevant offences in the UK, Canada and the US, and concluded that 'claims made to the Committee that sedition is no longer an offence in other western democracies appear to be incorrect.'[49]

Sedition in Australia

5.43 Submissions pointed out that the law of sedition has an equally troubled history in Australia, having been used against Eureka stockade rebels in the 1850s, anti-conscriptionists during World War I, and members of the Australian Communist

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45 *Submission 80*, p. 19; see also PIAC, *Submission 142*, p. 40; Mr David Bernie, NSW Council for Civil Liberties, *Committee Hansard*, 17 November 2005, p. 32.

46 *Committee Hansard*, 17 November 2005, p. 4; see also Mr Chris Connolly, *Tabled Document*, 17 November 2005, p. 4 and *Submission 56*, p. 9.

47 *Committee Hansard*, 17 November 2005, p. 32.

48 *Submission 290A*, Attachment A, p. 22.

49 *Submission 290A*, Attachment A, pp 22-23.

Party in the 1940s.[50] Mr Laurence Maher argued that recent Australian history demonstrates that 'sedition provisions have only ever been deployed to suppress dissident speech and highly unpopular groups'.[51] He also maintained that 'in most, if not all cases, the decision to prosecute was based on party political considerations'.[52]

5.44 Mr Chris Connolly concluded that the Bill 'reawakens this Cold War relic and breathes new life into it.'[53] Similarly, the Australian Screen Directors Association (ASDA) felt that the Bill 'dusts off' a 'dead-letter law', and that as a result, the ASDA could:

> ...no longer reassure its members, as it has been able to with a fair degree of certainty over the past 25 years, that sedition laws will not be invoked against directors making films that urge disaffection with the state or monarch.[54]

5.45 However, a representative of the Department argued that, with the advent of the Internet, sedition is 'more relevant now than in the postwar years of the 20th century'.[55] The Department later added that 'the web and computer technology has made it much easier to disseminate material that urges violence'.[56]

5.46 In contrast, the Gilbert and Tobin Centre of Public Law argued that:

> Old fashioned security offences are little used because they are widely regarded as discredited in a modern democracy which values free speech. Paradoxically, the danger in modernising these offences is that prosecutors may seek to use them more frequently, since they are considered more legitimate. A better approach is to abandon archaic security offences altogether in favour of using the ordinary law of incitement to crime, particularly since security offences counterproductively legitimise ordinary criminals as 'political' offenders.[57]

5.47 Mr Chris Connolly also queried the utility of sedition laws:

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50 See, for example, Mr Chris Connolly, *Submission 56*, pp 9-11; Fairfax and others, *Submission 88*, pp 6 and 8; Media, Entertainment and Arts Alliance, *Submission 198*, p. 5; Mr Laurence Maher, *Submission 275A*, pp 5-6 and 10; see also Laurence Maher, 'The Use and Abuse of Sedition' (1992) 14 *Sydney Law Review* 287-316; and Laurence Maher, 'Dissent, Disloyalty and Disaffection: Australia's Last Cold War Sedition Case' (1994) 16 *Adelaide Law Review* 1-77.

51 *Submission 275A*, p. 5.

52 *Submission 275A*, p. 5.

53 *Submission 56*, p. 13; see also *Committee Hansard*, 17 November 2005, pp 8-9.

54 *Submission 146*, p. 2; see also Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, *Committee Hansard*, 17 November 2005, p. 4.

55 *Committee Hansard*, 14 November 2005, p. 4; see also Attorney-General's Department, *Submission 290A*, pp 2-3.

56 *Submission 290A*, p 2.

57 *Submission 80*, pp 18-19.

> It is also difficult to find a single example of a sedition trial that resulted in a useful long-term outcome for the ruling authorities.[58]

5.48 Indeed, Mr Laurence Maher suggested that the law of sedition is actually self-defeating, because 'once the charge is laid in court, the media (and anyone else) is free to publish the dangerous words as part of an accurate court report'.[59]

The Gibbs Report

5.49 In 1991, Sir Harry Gibbs and others considered the sedition offences in the Crimes Act as part of a review of Commonwealth criminal law.[60] As noted earlier, the Explanatory Memorandum states that the Bill would update sedition offences 'in line with a number of recommendations' of the 1991 Gibbs Report.[61]

5.50 However, a number of submissions described this statement as 'disingenuous' or 'misleading'.[62] In particular, the Gilbert and Tobin Centre of Public Law pointed out that the amendments to the sedition offences in the Bill only selectively implement the Gibbs Report:

> The new offences partly implement the Gibbs Review of federal criminal law in 1991, including increasing the penalty from three to seven years in prison. Invoking the Gibbs Review is nonetheless selective and misleading, since Gibbs also recommended modernising (and narrowing) many of the other archaic 'offences against the government' in Part II of the *Crimes Act 1914*, including treason, treachery, sedition, inciting mutiny, unlawful (military) drilling, and interfering with political liberty. Gibbs further urged repeal of the offence of assisting prisoners of war to escape and the offences in Part IIA of the *Crimes Act 1914* (relating to 'unlawful associations' and industrial disturbances).[63]

5.51 Dr Ben Saul of the Gilbert and Tobin Centre of Public Law reiterated this at one of the committee's hearings:

> …invocation of or reliance on the Gibbs review of federal criminal law in 1991 is very misleading because, of course, Gibbs recommended abolishing many of the archaic security offences in part II of the Crimes Act, abolishing some of them and narrowing some of them. The government

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58 *Submission 56*, p. 9.

59 *Submission 275A*, p. 11.

60 Gibbs Report, Chapter 32, pp 301-307.

61 p. 88.

62 See, for example, Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 16; Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, *Committee Hansard*, 17 November 2005, p. 3; Mr Chris Connolly, *Submission 56*, p. 11; PIAC, *Submission 142*, p. 39; see also *Memorandum of Advice from Bret Walker SC and Peter Roney to ABC Legal*, 24 October 2005, p. 8 as contained in *Submission 153*, Annexure B.

63 *Submission 80*, p. 16.

> seems to have picked up on only one aspect of that, the sedition offences, leaving everything else in there and, as a result, creating a very confusing array of duplicate liabilities for very similar kinds of conduct.[64]

5.52 The Gilbert and Tobin Centre of Public Law concluded that this selective implementation of the Gibbs Report would result in 'ad hoc law reform which preserves some very broad and archaic security offences.'[65]

5.53 Similarly, Mr Chris Connolly argued that the 'main thrust of the Gibbs recommendations was to limit and tighten the sedition offences'.[66] He interpreted the Gibbs Report as recommending that the Crimes Act should:

> …be amended to repeal sedition and to rely on the crimes of incitement and treason where there was a clear intention of violent interference with the democratic process. However, no amendment had been prepared until the current proposals – and the current proposals are a more substantial revision of the sedition laws than recommended by Gibbs – and largely contrary to the Gibbs recommendations.[67]

5.54 In advice to the Australian Broadcasting Corporation (ABC), Mr Bret Walker SC stated that the suggestion that the amendments are occurring in the way recommended by the Gibbs Report is 'disingenuous' because:

> …the recommendations were quite different in context, and certainly did not include any recommendation to enact laws to the effect stated in subsections (7) and (8) of s.80.2 of the current Bill. True it is though that some of the changes sought to be affected by the Bill adopt parts of what the Committee Report suggested.[68]

5.55 A representative of the Department disagreed with the suggestion that the Bill's sedition offences differed substantially from the recommendations of the Gibbs Report.[69] He noted that the Gibbs Report 'concluded that there was still a need for a sedition offence in the context of 1991'.[70]

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64 *Committee Hansard*, 14 November 2005, p. 66.

65 *Submission 80*, p. 16.

66 Tabled Document, 17 November 2005, p. 8.

67 *Submission 56*, p. 11.

68 *Memorandum of Advice from Bret Walker SC and Peter Roney to ABC Legal*, 24 October 2005, p. 8.

69 *Committee Hansard*, 14 November 2005, p. 16; also *Submission 290A*, Attachment B, pp 24-25.

70 *Committee Hansard*, 18 November 2005, p. 23.

Need for sedition laws

5.56 However, many submissions queried whether the sedition offences are even necessary. In particular, it was suggested that the proposed offences duplicate existing law, such as the law of incitement to violence, which already adequately cover the relevant conduct.[71]

5.57 Further, in response to the committee's questioning, both Dr Saul of the Gilbert and Tobin Centre of Public Law and Professor McKinnon of the APC confirmed that they were confident that removal of Schedule 7 of the Bill would not weaken the Commonwealth's anti-terrorist capacity.[72]

5.58 Dr Saul argued that 'section 11.4 of the Criminal Code is sufficient to prosecute incitement to violence which has a specific connection to certain crime.'[73] The Gilbert and Tobin Centre of Public Law pointed out that, in relation to the first two new sedition offences (urging the overthrow of the Constitution or government, or interference with federal elections):

> Neither offence is necessary, since such conduct can already be prosecuted by combining the existing law of incitement to commit an offence (s 11.4, Criminal Code (Cth)) with the existing offence treachery (s 24AA, Crimes Act 1914 (Cth)) or the offence of disrupting elections (s 327, Commonwealth Electoral Act 1918).[74]

5.59 The committee questioned the Department as to the differences between the crime of incitement to commit an offence and the proposed sedition provisions (particularly subsections 80.2(1), (3) or (5)).[75] The Department responded that the crime of incitement was harder to prove because the crime of incitement requires the prosecution to prove not only that the person urged the commission of a criminal offence, but also that the person intended that the crime urged be committed.[76]

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71 See, for example, Mr Chris Connolly, *Submission 56*, pp 3 and 12; Gilbert and Tobin Centre of Public Law, *Submission 80*, pp 16-18; Mr David Bernie, NSW Council for Civil Liberties, *Committee Hansard*, 17 November 2005, pp 32-33; APC, *Submission 143*, p. 3; NAVA, *Submission 166*, p. 2; HREOC, *Submission 158B*, pp 1-5.

72 Dr Ben Saul, Gilbert and Tobin Centre of Public Law, *Committee Hansard*, 14 November 2005, p. 67; and see also Professor Kenneth McKinnon, APC, *Committee Hansard*, 17 November 2005, p. 13.

73 *Committee Hansard*, 14 November 2005, p. 66; see also Mr Jack Herman, APC, *Committee Hansard*, 17 November 2005, p. 5; HREOC, *Submission 158B*, pp 1-5.

74 *Submission 80*, p. 16; see also HREOC, *Submission 158B*, p. 3.

75 *Committee Hansard*, 14 November 2005, p. 21.

76 *Committee Hansard*, 14 November 2005, pp 17 and 21 and also *Submission 290*, p. 5; see also HREOC, *Submission 158B*, p. 3.

5.60 However, for many submitters, this was precisely the problem with the sedition offences – that the provisions do not require an intention of causing violence. This is discussed further in the section on 'fault elements' later in this chapter.

5.61 As a representative of the Department stated: 'there is absolutely no doubt that this offence [of sedition] will be easier to establish than the incitement to commit an offence'.[77] However, the Department argued that this was justified because 'in this case the urging of the use of force and violence is in its own right dangerous and should be prohibited as a separate offence.'[78]

5.62 The Gilbert and Tobin Centre of Public Law suggested that the last two offences (urging a person to assist organisations or countries fighting militarily against Australia) are similarly redundant:

> …because such conduct is already covered by applying the existing law of incitement to the existing federal offences of treason (s80.1, *Criminal Code*), treachery (s 24AA, *Crimes Act 1914*) and offences in ss 6–9 of the *Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth)*.[79]

5.63 Indeed, the committee asked departmental representatives to compare the offences in subsections 80.2(7) and (8) to the treason provisions in paragraphs 80.1(1)(e) and (f) of the Criminal Code. The representative responded that the treason provisions are broader, and attract life imprisonment as a maximum penalty.[80] The committee then queried the utility of these additional sedition offences when the treason provisions already encompass the relevant conduct. The representative responded:

> The proposal in this bill is to make this law relevant…this offence is becoming more relevant with the advent of the internet and the capacity to have a situation where violence is being urged on a very large scale.[81]

5.64 The Gilbert and Tobin Centre of Public Law did welcome the offence in subsection 80.2(5) for urging violence within the community, but suggested that the offence was too narrow and would be more appropriately placed in anti-vilification laws.[82]

5.65 The AFP told the committee that the modernised sedition offences are designed to address situations where members of the community:

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77 *Committee Hansard*, 18 November 2005, p. 37; and also *Submission 290A*, p. 3.

78 *Submission 290A*, p. 3.

79 *Submission 80*, p. 18; see also HREOC, *Submission 158B*, p. 3.

80 *Committee Hansard*, 14 November 2005, p. 22.

81 *Committee Hansard*, 14 November 2005, p. 22.

82 See further *Submission 80*, p. 17; and also PIAC, *Submission 142*, p. 41.

> …urge others to undertake terrorist activity as there are impressionable people who could be influenced by this behaviour. The committee would recall media coverage this year of publications inciting violence for sale in Australia, which highlighted that there is currently no clear offence to deal with this situation.[83]

5.66 In response to the committee's questioning on this issue, the AFP stated that it had raised the issue of inciting terrorist violence during the July-August 2005 review of the Commonwealth counter-terrorism legal framework undertaken by the Commonwealth Counter-Terrorism Legal Working Group. The AFP explained that it was advised by the Department during this review that 'the situation where people from one group in the community may be indirectly encouraging terrorist activity by urging violence against other groups in the community' was not covered in the current legislative framework by an offence 'with sufficient penalties'. In particular, it was advised that:

> …there is no clear offence in the Criminal Code for possessing, publishing, importing or selling publications, recruitment pamphlets and videos that advocate terrorism. Similarly, the provisions in the *Crimes Act 1914* prohibiting sedition, especially defining seditious intention and seditious words, may not adequately address such publications as their fault elements and defences are not suited to countering terrorism.[84]

5.67 The AFP gave a hypothetical example of a leader of a small extremist group who was:

> …urging their followers to take violent action in Australia in opposition to Australia's involvement in foreign conflicts. The leader is not directing the group as to the specific action they should take but is urging them to take violent action in the name of their extreme ideology...the AFP was advised by the Attorney-General's Department that this situation is not covered by the existing offence in the Criminal Code...[85]

5.68 The committee also asked the Department as to whether the existing laws of treason, sedition and inciting violence are sufficient to fight terrorism. In particular, the committee asked the Department for an example of conduct which the new sedition laws would catch which would not be caught by either the existing sedition laws; the existing treason laws; the existing law of incitement of violence; or the new proposed law in Schedule 1 relating to praising terrorism.[86] The Department submitted an example of an overseas web page giving instructions on how to shoot foreigners in

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83 *Committee Hansard*, 17 November 2005, p. 55; see also, for example, D Crawshaw, 'Police to investigate stores over hate books', *The Canberra Times*, 19 July 2005, p. 4; 'Throwing the book at hatred', *The Australian,* 19 July 2005, p. 12.

84 *Submission 195A*, p. 5; see also p. 4; and *Committee Hansard*, 17 November 2005, p. 68.

85 *Submission 195A*, pp 5-6; see also p. 4.

86 See *Committee Hansard*, 18 November 2005, pp 36-37.

the streets.[87] The Department believed that proposed subsection 80.2(5) (of urging a group to use force or violence against another group) would capture the type of conduct outlined on the web page, whereas existing offences would not be adequate. In particular, the Department suggested that:

> Although the page depicts shooting foreigners it does not appear to focus much on the political motivations which would be necessary for proof of a 'terrorist act' offence (so charging for incitement to commit a terrorist act offence or a terrorist act offence itself would appear excluded, as would an individual advocating a terrorist act offence) and it is probably insufficiently specific in terms of the target to be prosecuted as incitement to commit murder. The threat to kill offences in the Criminal Code, do not apply because of lack of specificity about who is being threatened (see section 474.15 – using a carriage service to make a threat).[88]

5.69 The Department described subsection 474.17 of the Criminal Code (using a carriage service to menace or cause offence) as 'feasible', but noted that the maximum penalty is 'only' 3 years imprisonment. Finally, the Department submitted that the existing sedition offences are probably not applicable because of the definition of 'seditious intention' at paragraph 24A(g) of the Crimes Act, which refers to promoting feelings of ill-will and hostility between different 'classes' of Her Majesty's subjects and could be read down by the court because the historic context suggests it is only a reference to social classes. The Department concluded, once again, that 'this [proposed new sedition] offence is easier to prove than the alternatives – it would not have been put forward if it was not'.[89]

Freedom of speech issues

5.70 Another key objection to the sedition provisions in the evidence received by the committee was their potential to limit freedom of speech.[90] Submissions were concerned about this from international law,[91] constitutional[92] and general policy perspectives. Some submissions acknowledged that the defences proposed in

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87 *Submission 290*, p. 2; referring to 'Terror web site tells how to kill foreigners', *The Canberra Times,* 19 November 2005, p. 21.

88 *Submission 290*, p. 3.

89 *Submission 290*, p. 3; and also *Submission 290B*, p. 14.

90 See, for example, Mr Simeon Beckett, ALHR, *Committee Hansard*, 14 November 2005, p. 47; Mr Chris Connolly, *Submission 56*, p. 3; Gilbert and Tobin Centre of Public Law, *Submission 80*, pp 20-21; ABC, *Submission 196*, p. 3; Law Council, *Submission 140*, p. 21; Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, *Committee Hansard*, 17 November 2005, p. 4; Mr Laurence Maher, *Submission 275A*, pp 14-15; Liberty Victoria, *Submission 221*, pp 24 and 27-28.

91 See, for example, HREOC, *Submission 158*, p. 27, which pointed to Article 19 of the ICCPR; ALHR, *Submission 139*, p. 222.

92 See, for example, Fairfax and others, *Submission 88*, pp 10-11; Law Council, *Submission 140*, pp 21-22; SBS, *Submission 164*, p. 3; Free TV Australia, *Submission 149*, p. 2.

Schedule 7 of the Bill might help to ameliorate the impact on freedom of speech.[93] However, criticisms of these defences are discussed further below.

5.71 Mr John North of the Law Council told the committee of the Law Council's concerns that the sedition amendments would:

> …not only cause journalists a great deal of problems but also will stop peace activists and other political protesters from being able to carry on in the normal course of events and thereby will affect freedom of speech.[94]

5.72 Indeed, many media organisations expressed concern about the sedition provisions. For example, Fairfax submitted its concern that:

> …there is a real risk, that a comment made, letter or advertisement published, wire service story or interview reproduced, factual report carried, video-tape footage published, editorial opinion expressed, or feature film or documentary screened might by reason of its subject matter, prominence, content, tone, wording, manner of promotion and ultimate authorship be held by a jury to amount to 'urging' within the meaning of the proposed section, particularly if it were perceived to form part of an ongoing campaign.[95]

5.73 In response to these concerns about the provisions, a departmental representative stated that there was no basis for concern, because the sedition offences focus on the intention to urge the use of force and violence:

> I do not think anyone is suggesting that Australia's media, and I just cannot think of any situations where our media, has urged violence.[96]

5.74 However, Mr Bret Walker SC, in his advice to the ABC, gave a number of examples of the types of speech which might be impacted on by the Bill, including:

> …offensive or emotional opinion about the significance of the events at 9-11, whether the terrorists involved had any justification for their acts, opinion about the validity of what terrorist leaders might be seeking to achieve, the desirability at an international level of victory against the American forces in Iraq (as expressed by John Pilger and dealt with later in this advice), or the inevitability of further terrorist acts, for example, in

93 See, for example, Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 21.

94 *Committee Hansard*, 14 November 2005, pp 77-78.

95 *Submission 88*, p. 7; see also, for example, APC, *Submission 143*, pp 2-3; SBS, *Submission 164*, pp 3-4; ABC, *Submission 196*, p. 4; Free TV Australia, *Submission 149*, p. 2; Media, Entertainment and Arts Alliance, *Submission 198*, p. 5.

96 *Committee Hansard*, 14 November 2005, p. 16.

> Bali, and as to whether Australian citizens should expect more of the same should they continue to be involved in the Iraqi war.[97]

5.75 Some submissions suggested that the sedition provisions could raise constitutional issues, and in particular, potentially breach the implied freedom of political communication in the Constitution.[98] The Gilbert and Tobin Centre of Public Law was more circumspect, noting that:

> …the Australian Constitution impliedly protects only *political* communication…and not speech more generally. This means that Australian courts are less able to supervise sedition laws for excessively restricting free expression.[99]

5.76 However, the Gilbert and Tobin Centre of Public Law also noted that there may be other constitutional issues:

> The express constitutional protection for freedom of religion in Australia (s116, Constitution) may raise a different challenge to the third new sedition offence of incitement to religious violence. The Commonwealth cannot make any law 'for prohibiting the free exercise of religion'. There is little case law on the scope of this speech aspect of s116 and it remains to be seen whether the 'free exercise' of religion would protect religious speech.[100]

5.77 In response to concerns that the sedition offences may breach the implied constitutional freedom of political communication, the Department noted that it had obtained advice from the Australian Government Solicitor and was 'satisfied that the amended provisions do not breach the implied constitutional freedom of political communication.'[101] The Department also submitted that, in terms of freedom of expression under international law:

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97 *Memorandum of Advice from Bret Walker SC and Peter Roney to ABC Legal*, 24 October 2005, p. 13 and see pp 14-15 for discussion of the Pilger interviews; see also, for example, Mr Ibrahim Abraham, Castan Centre for Human Rights Law, *Committee Hansard*, 14 November 2005, p. 55 and *Submission 116*, pp 31-35; and for other examples see Mr Laurence Maher, *Submission 275A*, pp 9-11. Others cast doubt on Mr Walker's interpretation: see for example, Sue Harris Rimmer, Ann Palmer, Angus Martyn, Jerome Davidson, Roy Jordan and Moira Coombs, Parliamentary Library, *Anti-Terrorism Bill (No. 2) 2005*, Bills Digest No. 64 2005-06, 18 November 2005 (Bills Digest), pp 45-46 and see also the discussion of fault elements later in this chapter.

98 See, for example, Fairfax and others, *Submission 88*, pp 10-11; Law Council, *Submission 140*, pp 21-22; SBS, *Submission 164*, p. 3; Free TV Australia, *Submission 149*, p. 2; several of these submissions cited *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

99 *Submission 80*, p. 22; see also Dr Ben Saul, Gilbert and Tobin Centre of Public Law, *Committee Hansard*, 14 November 2005, pp 60 and 67 for a discussion of problems with similar proposals in the UK and the US.

100 *Submission 80*, p. 23.

101 *Submission 290A*, Attachment A, p. 21.

> The right to freedom of expression under Article 19(2) of the ICCPR may be subject to restrictions provided by law, and that are necessary for the protection of national security and public order. The Government is satisfied that restrictions on communication imposed by the measures are necessary for the protection of national security. The Government is also satisfied that the defence of 'good faith' will adequately ensure that people who make comments without seeking to incite violence or hatred will not be deprived of the freedom of speech. Indeed, subsection 80.2(5) is in part implementation of Article 20 of the ICCPR which requires State parties to prohibit advocacy that incites violence, discrimination or hostility.[102]

5.78 A representative of the Department also noted that the offences would need to be proven beyond reasonable doubt, and that the Director of Public Prosecutions would need to be convinced that any such cases would be worth prosecuting.[103]

5.79 Dr Saul of the Gilbert and Tobin Centre of Public Law acknowledged the need to be realistic about the potential operation of the legislation:

> Of course these laws are subject to prosecutorial discretion, in the ordinary way that crimes are. I think that many of the statements which people have suggested might fall within the laws may well fall within the laws, but of course they will never be prosecuted. Prosecutors are realistic about this. The Attorney-General having to sign off on prosecutions is a good additional protection.[104]

5.80 At the same time, he questioned:

> Why are you putting a law on the books which allows fairly innocuous statements to be, potentially, subject to prosecution? The good faith defences are too narrow, as people have pointed out. Why do you even need a good faith qualification? How do you protect things like satire and comedy, artistic expression and so forth, which may not intend to be constructive and pointing out errors or mistakes in government, but may simply want to express a point of view?[105]

Self-censorship

5.81 Indeed, many submissions suggested that 'self-censorship' could become an issue if the provisions were to be enacted.[106] That is, people might 'err on the side of

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102 *Submission 290A*, Attachment A, p. 6.

103 *Committee Hansard*, 14 November 2005, p. 9.

104 *Committee Hansard*, 14 November 2005, p. 68.

105 *Committee Hansard*, 14 November 2005, p. 68.

106 See, for example, Professor Kenneth McKinnon, APC, *Committee Hansard*, 17 November 2005, pp 2 and 5 and also *Submission 143*, p. 3; Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, *Committee Hansard*, 17 November 2005, pp 5 and 11; NAVA, *Submission 166*, p. 6; Liberty Victoria, *Submission 221*, p. 27; Castan Centre for Human Rights Law, *Submission 116*, p. 35.

caution and limited themselves in what they say'.[107] For example, the National Association for Visual Arts (NAVA) submitted that, if Schedule 7 were enacted:

> …self-censorship is the likely course of action for many artists, galleries and other art organisations. For fear of possible misinterpretation of their work or abuse of power by government or police, artists and galleries will be under pressure. The result could be the stifling of free inquiry and expression with a consequent quelling of expression of opinion, censorship of any perceived form of dissent and the resulting blandness of contemporary cultural production.[108]

5.82 Similarly, Mr Beckett of ALHR commented that:

> There may not be a specific prosecution, or it might be a while before a specific prosecution occurs and the law is clarified, and a number of people may seek advice and the advice may be— as it has been in the last couple of weeks—that what they are doing is arguably sedition within the definitions that are currently there. So there is a fear, a legitimate fear, that somebody may have committed an offence or be proposing to do a painting or organise a skit or produce and broadcast a particular show on TV that is an offence punishable by seven years imprisonment.[109]

5.83 The ABC submitted that its key concern was that:

> …legitimate discussion and debate in the media about terrorism and related issues is likely to be stifled as no media organisation or personnel could, at the risk of imprisonment for 7 years, confidently predict what would pass the test and would, therefore, err on the side of extreme caution.[110]

5.84 As the Law Council stated, 'such caution is not in the interests of informed political debate.'[111]

5.85 Mr Abraham of the Castan Centre for Human Rights Law observed along the same lines: 'our concern is not only with what convictions it might bring about but also whether this legislation will effect a demonstrative change in people's behaviour.'[112]

5.86 In response to concerns about self-censorship, the Department submitted that:

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107 Ms Agnes Chong, AMCRAN, *Committee Hansard*, 17 November 2005, p. 22.

108 *Submission 166*, p. 6.

109 *Committee Hansard*, 14 November 2005, p. 49.

110 *Submission 196*, p. 3.

111 *Submission 140*, p. 21.

112 *Committee Hansard*, 14 November 2005, p. 52.

> The policy is to 'chill' comments where they consist of urging the use of force or violence against our democratic and generally tolerant society in Australia.[113]

Counterproductive

5.87 As with other aspects of the Bill, some submitters were concerned that the sedition offences could actually be counterproductive, because they may simply drive terrorism underground and/or fuel terrorism further.[114] For example, the Islamic Council of Victoria submitted that:

> …punishing individuals for having or even expressing views that, while they may be radical, extreme, inflammatory, misguided, or otherwise unpopular politically, but do not cross the threshold into direct incitement to physical violence, is likely to be extremely counterproductive…such views should be tackled by positive and proactive measures such as engagement and dialogue…the use of anachronistic sedition offences will only harden the stances of those who already feel alienated and disenfranchised by government policies.[115]

5.88 Similarly, the Gilbert and Tobin Centre of Public Law warned that:

> There is a danger that criminalising the general expression of support for terrorism will drive such beliefs underground. Rather than exposing them to public debate, which allows erroneous or misconceived ideas to be corrected and ventilates their poison, criminalisation risks aggravating the grievances underlying terrorism and thus increasing it…While some extreme speech may never be rationally countered by other speech, the place for combating odious or ignorant ideas must remain in the cut and thrust of public debate…Unless we are able to hear and understand the views of our political adversaries, we cannot hope to turn their minds and convince them that they are wrong, or even to change our own behaviour to accommodate opposing views that turn out to be right.[116]

5.89 The Gilbert and Tobin Centre of Public Law concluded that 'a robust and mature democracy should be expected to absorb unpalatable ideas without prosecuting them.'[117]

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113 *Submission 290*, p. 2.

114 See, for example, Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 21; Mr Joo-Cheong Tham and others, *Submission 81*, p. 8; APC, *Submission 143*, p. 3; Liberty Victoria, *Submission 221*, pp 28-29.

115 *Submission 226*, p. 7.

116 *Submission 80*, p. 21.

117 *Submission 80*, p. 21.

Racial vilification

5.90 A representative of the Department, in arguing that the Bill is non-discriminatory, pointed out that:

> Even in the elements of sedition it is about protecting groups in our society regardless of their race, religion, nationality or political opinion.[118]

5.91 However, the Islamic Council of Victoria contrasted the Bill with Victoria's *Racial and Religious Tolerance Act 2001* (RRTA), stating that:

> [T]he RRTA protects citizens from discrimination and vilification on the basis of race or religion by providing a mechanism for hate speech to be curtailed in public judicial proceedings, while the Bill's sedition provisions expose a wide-ranging section of the community to criminal prosecution under secretive, draconian security measures on the basis of their political or religious views.[119]

5.92 As noted earlier, the Gilbert and Tobin Centre of Public Law welcomed the offence in subsection 80.2(5) for urging violence within the community, because it would criminalise the incitement of violence against racial, religious, national or political groups, as required by Australia's human rights treaty obligations.[120] However, at the same time, it suggested that the offence was too narrow and would be more appropriately placed in anti-vilification laws.[121]

5.93 Similarly, HREOC noted that 'it has been suggested that the proposed [sub]section 80.2(5) strays into the area of discrimination and vilification law'. HREOC advised the committee that it:

> …has previously called for the introduction of comprehensive religious discrimination and vilification laws at the federal level, consistent with Australia's international human rights obligations under article 20(2) of the ICCPR and article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination*. The Commission considers the enactment of such legislation to address discrimination and vilification against Arab and Muslim Australians is crucial to combating terrorism. However, rather than attempt to do this under the umbrella of sedition laws, Parliament should address the topic in separate legislation so as to allow for a proper consideration of the interests and issues involved.[122]

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118 *Committee Hansard*, 14 November 2005, p. 4.

119 *Submission 226*, p. 8.

120 For example, Article 20(2) of the ICCPR and Article 4 of the *International Convention on the Elimination of all Forms of Racial Discrimination 1969*.

121 *Submission 80*, p. 17; Mr David Bernie, NSW Council for Civil Liberties, *Committee Hansard*, 17 November 2005, p. 35; and Ms Jane Stratton, PIAC, *Committee Hansard*, 14 November 2005, p. 38 and PIAC, *Submission 142*, p. 41.

122 *Submission 158*, p. 31; see also Dr Waleed Kadous, AMCRAN, *Committee Hansard*, 17 November 2005, p. 29.

Other specific issues

5.94 Specific issues raised in relation to the sedition provisions discussed in this section include:

- the definition of 'urging';
- fault elements; and
- the requirements for links to violence.

Definition of 'urging'

5.95 Several submitters noted that there is no definition of 'urging' in the Bill or in the Criminal Code, and were concerned that it could be defined very broadly.[123] However, the Department submitted that:

> …the incitement offence in section 11.4 of the Criminal Code uses the word 'urge'. This language was recommended as a plain English way of capturing the essence of the offence, by the Commonwealth, State and Territory offices on the Model Criminal Code Officers Committee…Some courts have interpreted 'incites' as only requiring that a person causes rather than advocates the offences. The use of the word 'urge' is designed to avoid this ambiguity.[124]

Fault elements

5.96 There was considerable debate and indeed, confusion, during the committee's inquiry over the fault elements required under the proposed sedition provisions. The committee received a large amount of evidence expressing concern about the use of the standard of 'recklessness' in the provisions, rather than 'intention'.[125] Many submissions were also concerned that, unlike the existing sedition offences in the Crimes Act, the new offences would not require an intention to cause violence.[126]

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123 For example, ABC, *Submission 196*, pp 3-4; Law Council, *Submission 140*, p. 22; Liberty Victoria, *Submission 221*, p. 26.

124 *Submission 290*, p. 4.

125 See, for example, ABC, *Submission 196*, p. 3; Law Council, *Submission 140*, p. 21 and also Mr John North, Law Council, *Committee Hansard*, 17 November 2005, p. 79; Professor Kenneth McKinnon, APC, *Committee Hansard*, 17 November 2005, pp 2 and 10 and also *Submission 143*, p. 3; Mr David Bernie, NSW Council for Civil Liberties, *Committee Hansard*, 17 November 2005, pp 33 and 37-38; ALHR, *Submission 139*, p. 20; Mr Laurence Maher, *Submission 275A*, p. 16; PIAC, *Submission 142*, p. 40.

126 See, for example, Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 19; Fairfax and others, *Submission 88*, pp 7-8; Free TV Australia, *Submission 149*, p. 2; HREOC, *Submission 158A*, p. 3; Liberty Victoria, *Submission 221*, p. 25; see also *Memorandum of Advice from Bret Walker SC and Peter Roney to ABC Legal*, 24 October 2005, p. 7 (citing *R v Chief Metropolitan Stipendiary Magistrate; ex parte Choudhury* [1991] 1 QB 429) as contained in *Submission 153*, Annexure B. Also available at: http://abc.net.au/mediawatch/img/2005/ep34/advice.pdf (accessed 21 November 2005).

5.97 In the context of the fault elements required by the sedition provisions, many submissions referred to advice provided by Mr Bret Walker SC to the ABC.[127] In this advice, Mr Walker argued that under the proposed offences:

> …it is no longer a requirement to prove an intention to promote feelings of ill-will and hostility to establish seditious intention. It will be enough, in some cases, that one did an act which might promote those feelings if one acted recklessly and that result followed. Secondly, the requirement that there be not only proof of an incitement to violence, but actual violence or resistance or defiance for the purpose of disturbing the constituted authority, is no element of the offence. It is enough that there is the urging of 'another person' to do any of the categories of acts prohibited.[128]

5.98 Mr Walker further advised that:

> There is no reference within the proposed s.80.2 to any requirement that the person doing the urging have any particular intention, such as the previous requirement for the intention to cause violence or create public disorder or disturbance. Notwithstanding the reference to application of principles of recklessness, to 3 of the proposed new offences, apart from an intention that the offender be required to intentionally engage in the act which amounts to the urging, it is not required that he be shown to intend the result. On one view of it at least, one could make a statement intentionally, and which might be seen as amounting to urging another to use force or violence against another group, without intending that result at all.[129]

5.99 In response a departmental representative noted that he respectfully disagreed 'absolutely and entirely'[130] with advice provided by Mr Bret Walker SC to the ABC (that urging may be unintentional or inadvertent). He argued that such urging would have to be intentional.[131]

5.100 Mr Walker subsequently noted the representative's comments, but suggested that it was important to be:

> …very cautious about applying the rather remarkable abstract and highly conceptualised provisions of sections 5.1 to 5.6 of the Criminal Code to the

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127 See *Memorandum of Advice from Bret Walker SC and Peter Roney to ABC Legal*, 24 October 2005, available at: http://abc.net.au/mediawatch/img/2005/ep34/advice.pdf (accessed 21 November 2005). Referred to, for example, in the following submissions: Representatives of the Arts and Creative Industries of Australia, *Submission 153*, Annexure B; Federation of Community Legal Centres (Vic), *Submission 167*, p. 42; ALHR, *Submission 139*, p. 23; Liberty Victoria, *Submission 221*, p. 36.

128 *Memorandum of Advice from Bret Walker SC and Peter Roney to ABC Legal*, 24 October 2005, p. 10.

129 *Memorandum of Advice from Bret Walker SC and Peter Roney to ABC Legal*, 24 October 2005, p. 11.

130 *Committee Hansard*, 14 November 2005, p. 17.

131 *Committee Hansard*, 14 November 2005, p. 17.

> sedition proposals…the only element of intention that those provisions require, in my opinion—at least arguably so—is that you mean to urge, which is quite different from meaning that there be an outcome from the intermediaryship of two, three, four or however many other people in relation to violent effects not only in this country but elsewhere.[132]

5.101 The Gilbert and Tobin Centre of Public Law contrasted the fault elements for the existing sedition offences in the Crimes Act and the law of incitement (in section 11.3 of the Criminal Code) with the sedition offences proposed by Schedule 7 of the Bill. It suggested to the committee that the existing sedition offences in the Crimes Act require, first, an intention to utter seditious words or engage in seditious conduct (with a seditious intention), with the further intention of causing violence or creating a public disorder or disturbance.[133] In noting that the existing law of incitement could cover much of the conduct falling within the new sedition offences, the Gilbert and Tobin Centre of Public Law noted that the law of incitement also required both intentional urging and a further ulterior intention that the offence incited be committed.[134] The Gilbert and Tobin Centre of Public Law suggested that:

> Requiring that an inciter intend that the offence be committed reflects the vital normative idea that responsibility for criminal harm should primarily lie with the perpetrators, who are free agents not bound to act on the words of others.[135]

5.102 However, according to its analysis:

> …unlike existing offences of both sedition and incitement, the Bill imposes no further requirement of an ulterior intention that the specified conduct actually be committed by the persons urged. The offences are thus wider than the scope of the existing offences of sedition and incitement.[136]

5.103 The Gilbert and Tobin Centre of Public Law therefore concluded that proposed offences:

> …criminalise indirect incitement or generalised expressions of support for terrorism, without any specific intention to encourage violence or any connection to a particular offence.[137]

5.104 However, the Gilbert and Tobin Centre of Public Law argued that 'only incitements which have a direct and close connection to the commission of a specific crime are justifiable restrictions on speech'.[138]

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132 *Committee Hansard*, 17 November 2005, p. 83.

133 Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 19; see also *Submission 80A,*p. 1.

134 Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 19; see also *Submission 80A*, p. 1.

135 Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 19.

136 *Submission 80A*, p. 2.

137 Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 20; see also *Submission 80A*, p. 2.

138 *Submission 80*, p. 20.

5.105 Similarly, HREOC also came to the conclusion that the proposed sedition provisions do not require a specific intention that the third person use force or violence.[139] HREOC also agreed that the existing law of incitement clearly requires 'that the inciter intend that the incitee use force or violence'.[140] However, on HREOC's interpretation of the Department's evidence, this was the difficulty which the new sedition offences were designed to overcome, because under these provisions:

> The prosecution may, of course, face difficulties in proving that in uttering particular words a person intended that the person or people to whom they were uttered would commit a particular crime. That would be a significant obstacle in the case of words that are more general in nature.[141]

5.106 However, HREOC expressed the view that:

> ….that is an entirely appropriate limitation, which will ensure that the Criminal Code is not used to prosecute those whose words (while distasteful) are in the sphere of legitimate free speech which attracts the protection of article 19 of the ICCPR. As noted above, that was also the view expressed by the Criminal Law Officers Committee in its final report into the Model Criminal Code.[142]

5.107 However, a representative of the Department claimed that some of the opinions provided on the sedition provisions:

> …exhibited a misunderstanding of the fact that the urging behaviour is conduct and has to be intentional. Some of the people with those opinions are not familiar with [the] Criminal Code and so do not understand how the Criminal Code and fault elements apply.[143]

5.108 The representative responded to the concerns raised in relation to 'intention' and 'recklessness' by explaining to the committee that the 'urging' under proposed section 80.2 must be intentional because it is a conduct element of the offence.[144] The representative pointed to section 5.6 of the Criminal Code, which provides for offences that do not specify fault elements as follows:

> (1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

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139 *Submission 158A*, pp 2-3. Note that HREOC's reasoning was slightly different to that of the Gilbert and Tobin Centre of Public Law; and see also Attorney-General's Department, *Submission 290*, p. 2, which suggests that HREOC's interpretation is 'not supported by the construction of the offences'.

140 *Submission 158B*, p. 5.

141 *Submission 158B*, p. 5.

142 *Submission 158B*, p. 5; see also Gilbert and Tobin Centre of Public Law, *Submission 80A*, p. 2.

143 *Committee Hansard*, 14 November 2005, p. 10.

144 *Committee Hansard*, 14 November 2005, pp 10, 16-17 and *Submission 290*, p. 5.

> (2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

5.109 The representative also suggested that:

> In fact, recklessness is only applying to the elements of the offence that are about understanding that it is about overthrowing our Constitution and understanding that in fact you are calling for the overthrow of our government and all lawful authority of the government. The intention still remains the fault element for the urging part of it—that is, urging another to overthrow by force or violence. Urging, of course, is conduct under the Criminal Code. Intention is the fault element for that.[145]

5.110 In other words, the representative argued that the conduct – that is the urging of violence – has to be intentional, whereas the consequence of that conduct is reckless.[146] In response to the committee's questioning as to whether words could be inserted into section 80.2 to clarify that the urging was required to be intentional, a representative of the Department conceded that this could be done.[147]

5.111 In response to the committee's questions as to whether these fault requirements were broader than the existing Crimes Act provisions, the representative replied that they were 'probably slightly' broader.[148] The Department also provided further information to the committee to explain that:

> Like the incitement offences [in section 11.4 of the Criminal Code] the prosecution must prove that the person intended to urge the conduct. As mentioned above, 'urging' is intentional because it is a conduct element of the offence. However, unlike the incitement offences sedition does not require the prosecution to prove that the person intended the crime urged be committed.[149]

5.112 The Department continued:

> The prosecution must prove that the person was reckless as to whether the thing against which the person urged the use of force or violence as, for example a group distinguished by race, religious, nationality or political opinion.[150]

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145 *Committee Hansard*, 14 November 2005, p. 8; see also *Committee Hansard*, 18 November 2005, pp 37-39.

146 *Committee Hansard*, 18 November 2005, p. 38; cf HREOC, *Submission 158A*, p. 3; Mr Bret Walker SC, *Committee Hansard*, 14 November 2005, p. 17.

147 *Committee Hansard*, 18 November 2005, p. 39.

148 *Committee Hansard*, 14 November 2005, p. 9.

149 *Submission 290*, p. 5.

150 *Submission 290*, p. 5.

5.113 However, Mr Walker argued that there were contradictions in the evidence from the departmental representative:

> …he agreed—and here I strongly agree with him, respectfully—that aspects of the proposed new sedition offences made the prosecution's task less difficult than the pre-existing and continuing to exist offences in relation to incitement to violence et cetera…He would not be right in saying that, according to his own lights, if it is true that for all urging offences you have to intend the outcome of somebody else's actions. That is true of incitement to violence. You have to intend that the violent offence be committed. But I do not believe it is anywhere near as clear as he thought in his evidence that that is true of urging in the new provisions.[151]

5.114 Several submissions suggested that the fault elements of the provisions were ambiguous. For example, HREOC submitted that:

> At the very least, the matters outlined above indicate that the reach of the proposed offences, as currently drafted, is ambiguous. This is highly undesirable given that the proposed offences encroach upon the right to freedom of expression.[152]

5.115 Similarly, Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, suggested to the committee:

> Freedom of speech and expression is a fundamental part of the Australian way of life. In the absence of a bill of rights, any proposed law that in any way impacts on this freedom enjoyed by all Australians needs significant scrutiny and must, in our view, have absolute clarity of intention and application…It is our view that there should be no room at all for misinterpretation on matters that deal with freedom of speech in a democracy. The law needs to be much clearer than it is. Regardless of individual opinions on the application of the proposed laws, it is our view that the scale of debate on how they will be applied is evidence enough of the danger that their lack of clarity poses.[153]

5.116 And again, in this context, it was suggested that any lack of clarity could lead to over-caution, and, in turn, self-censorship (as discussed earlier in the section on freedom of speech).[154]

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151 *Committee Hansard*, 17 November 2005, p. 83.

152 *Submission 158A*, p. 3; *Submission 158*, pp 27-30; see also Ms Jane Stratton, PIAC, *Committee Hansard*, 14 November 2005, p. 39.

153 *Committee Hansard*, 17 November 2005, p. 4; see also p. 5.

154 See, for example, Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, *Committee Hansard*, 17 November 2005, p. 5 and p. 11; Professor Kenneth McKinnon, APC, *Committee Hansard*, 17 November 2005, p. 5.

Links to violence

5.117 Many submissions pointed out that, unlike the current sedition offences, two of the proposed offences in subsections 80.2(7) and (8) (relating to assisting the enemy) do not require any link to force or violence, but simply support of 'any kind' for the enemy.[155] It was suggested to the committee that these provisions in particular, were not a mere update of existing laws, but represented two completely new offences which 'considerably expand existing sedition laws'.[156] Some submissions also argued that the offences in subsections 80.2(7) and (8) conflict with the Gibbs Report recommendation that new sedition offences should be linked to the incitement of violence.[157]

5.118 Others were also concerned at the breadth of the terminology used in these proposed subsections, such as the terms 'assist, by any means whatever'. For example, Mr Simeon Beckett of ALHR argued that the term:

> …'by any means whatever' is so remarkably broad that you start to question what is the policy intent of that. Obviously, the idea is any means of assistance to a terrorist organisation, but it includes that 'any means whatever'. It includes rhetorical support for a particular organisation.[158]

5.119 Similarly, the Law Council commented that these offences 'go well beyond the traditional common law understanding of sedition [and] could be construed to include peace activists and protestors'.[159]

5.120 Indeed, many submissions felt that these provisions were too broad, and would cover certain statements relating to, for example, the war in Iraq. For example, Fairfax and others submitted that:

> We are concerned that published opinion which might be seen to support or lend sympathy to claims made by terrorist leaders (or leaders of groups which might encounter the ADF in the course of peace-keeping operations

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155 See, for example, Chris Connolly, *Submission 56*, pp 3 and 14 and *Committee Hansard*, 17 November 2004, p. 6; Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 19; Australian Screen Directors Association, *Submission 146*, p. 3; NAVA, *Submission 166*, p. 7; ALHR, *Submission 139*, p. 21.

156 HREOC, *Submission 158*, p. 29; see also Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, *Committee Hansard*, 17 November 2005, p. 3; PIAC, *Submission 142*, p. 40.

157 See, for example, Liberty Victoria, *Submission 221*, p. 24; Mr Chris Connolly, *Submission 56*, p. 14.

158 *Committee Hansard*, 14 November 2005, p. 48; see also Mr David Bernie, NSW Council for Civil Liberties, *Committee Hansard*, 17 November 2005, p. 36; HREOC, *Submission 158*, p. 29; PIAC, *Submission 142*, p. 40; NAVA, *Submission 166*, p. 8; Liberty Victoria, *Submission 221*, pp 24-25; *Memorandum of Advice from Bret Walker SC and Peter Roney to ABC Legal*, 24 October 2005, p. 12.

159 *Submission 140*, p. 22; see also APC, *Submission 143*, p. 3.

> overseas) about what they are seeking to achieve, the just nature of their cause, that victory against the 'Coalition of the willing' in Iraq would be a good thing, or even that Australians should expect a terrorist attack if the Commonwealth continues to support the Iraq war, all risk falling foul of the section.[160]

5.121 Similarly, Mr Bret Walker SC, in his advice to the ABC, expressed the opinion that proposed subsection 80.2(8) would 'conceivably extend to providing verbal support or encouragement for insurgent groups who might encounter the Australian Defence Force which is present in their country.'[161]

5.122 However, the Department responded to concerns about the offences in proposed subsections 80.2(7) and (8), by stating that these offences:

> …were clearly contemplated by the existing sedition offence in section 24A of the Crimes Act [which] was intended to capture assisting enemies or those engaged in combat against the Defence Force. That is because subsection 24F(1) created an exception to the sedition offences while subsection 24F(2) created an exception to that exception that refers to assisting enemies or those engaged in combat against the Defence Force.[162]

Defences, safeguards and penalties

5.123 Other issues raised in relation to the sedition offences include:

- proposed defences;
- the burden of proof for the defences;
- other safeguards in the provisions; and
- the penalty increase.

Defences

5.124 Submissions were also critical of the defences to, and penalties for, the proposed sedition offences. In particular, many submissions argued that the defence in

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160 *Submission 88*, p. 8; see also, for example, Free TV Australia, *Submission 149*, p. 2.

161 *Memorandum of Advice from Bret Walker SC and Peter Roney to ABC Legal*, 24 October 2005, p. 13.

162 *Submission 290A*, Attachment A, p. 21.

proposed section 80.3 for acts done in 'good faith' is too limited and narrow.[163] Indeed, some questioned the concept and meaning of 'good faith'.[164]

5.125 Mr Bret Walker SC, in his advice to the ABC, expressed the opinion that the operation of the defence in section 80.3 is:

> …limited to demonstrating attempts to point out errors or mistakes in policy by Australian Governmental institutions, Governments or persons responsible for them from other countries, achieving lawful changes to the legal status quo or matters which are intending to create ill will or hostility between groups in order to bring about the removal of that hostility.[165]

5.126 It was suggested that this defence would only protect certain political expression, but not academic, educational, artistic, scientific, religious, journalistic or other public interest purposes.[166]

5.127 The Gilbert and Tobin Centre of Public Law expressed the view that this was required because:

> The range of human expression worthy of legal protection is much wider than that protected by the Bill's narrow defences, which are more concerned with not falling foul of the implied constitutional freedom of political communication than with protecting speech as inherently valuable.[167]

5.128 Similarly, Mr Jack Herman of the APC observed that 'the good faith provision probably provides no greater protection than already exists under the Lange defence [the implied freedom of political communication]'.[168]

5.129 The Gilbert and Tobin Centre of Public Law also noted that the defence does not include an immunity for journalists who merely report, in good faith, views expressed by others.[169]

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163 See, for example, Professor Kenneth McKinnon, APC, *Committee Hansard*, 17 November 2005, p. 2 and APC, *Submission 143*, p. 3; Ms Jane Stratton, PIAC, *Committee Hansard*, 14 November 2005, p. 39; Mr Chris Connolly, *Submission 56*, p. 14; Fairfax and others, *Submission 88*, pp 9-10; Free TV Australia, *Submission 149*, p. 2; HREOC, *Submission 158*, p. 30; ALHR, *Submission 139*, p. 20; Liberty Victoria, *Submission 221*, p. 27; Castan Centre for Human Rights Law, *Submission 116*, p. 35.

164 See, for example, Mr Bret Walker SC, *Committee Hansard*, 17 November 2005, p. 87.

165 *Memorandum of Advice from Bret Walker SC and Peter Roney to ABC Legal*, 24 October 2005, pp 11-12; see also Mr Chris Connolly, *Committee Hansard*, 17 November 2005, p. 12.

166 See, for example, Mr Chris Connolly, *Committee Hansard*, 17 November 2005, p. 5 and also *Submission 56*, pp 14-15; Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 21; Liberty Victoria, *Submission 221*, p. 27; Castan Centre for Human Rights Law, *Submission 116*, pp 31 and 35.

167 *Submission 80*, p. 21.

168 *Committee Hansard*, 17 November 2005, p. 5; and see also *Submission 143*, p. 3.

169 *Submission 80*, p. 21; see also Fairfax, *Submission 80*, p. 9; ABC, *Submission 196*, p. 4.

5.130 Similarly, Professor Kenneth McKinnon of the APC was concerned that:

> Even third-hand reporting of a dissident group somewhere in Australia or abroad or what might appear to be support for dissident groups in Iraq is really problematic and cannot be defended.[170]

5.131 In response to the committee's questioning as to whether the 'good faith defence' would cover, for example, people who had advocated during the Vietnam war that they wanted the North Vietnamese to win, Mr Bret Walker SC responded:

> My guess, as a professional advocate, is yes, you would win that argument. Could you be sure in advance? No. Would you be nervous as you waited for the outcome of the no case submission? You bet. Would you be nervous if it got to the jury? Very...[I]n considering the good faith defence, the jury or the court could take into account the fact that the urging, say, of the Australian troops to leave South Vietnam could be regarded as having been done with the intention of assisting an organisation engaged in armed hostilities. I would have thought that it clearly was, because I do not actually accept that there is a distinction between the North Vietnamese winning and the allies leaving.[171]

5.132 Several submissions suggested that, at the very least, there should be a media-specific exception to the sedition provisions.[172] Fairfax and others pointed to precedents for such media exemptions in the *Trade Practices Act 1974* and in the *Privacy Act 1988*.[173]

5.133 Mr Jack Herman of the APC pointed out that the sedition provisions appear to criminalise even 'expressions of an artistic, satirical or humorous nature.'[174] For this reason, he suggested a further exemption for artistic expression.[175]

5.134 HREOC (and many others) went broader, suggesting that, if the sedition provisions remain in the Bill at all, a broad defence along the lines of the defence contained in section 18D of the *Racial Discrimination Act 1975* should be

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170 *Committee Hansard*, 17 November 2005, p. 2.

171 *Committee Hansard*, 17 November 2005, p. 86.

172 Fairfax and others, *Submission 88*, p. 12; Law Council, *Submission 140*, p. 21; Mr John North, Law Council, *Committee Hansard*, 14 November 2005, p. 79; ABC, *Submission 196*, p. 4; Mr Jack Herman, APC, *Committee Hansard*, 17 November 2005, pp 3 and 7.

173 *Submission 88*, p. 12; see also, for example, Free TV Australia, *Submission 149*, p. 2.

174 *Committee Hansard*, 17 November 2005, pp 3 and 7; see also APC, *Submission 143*, p. 3; Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 21 and HREOC, *Submission 158*, p. 30.

175 *Committee Hansard*, 17 November 2005, p. 3; cf Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, who simply opposed the sedition provisions altogether: *Committee Hansard*, 17 November 2005, p. 7.

considered.[176] Section 18D provides a defence to certain provisions of the *Racial Discrimination Act 1975* for anything said or done reasonably and in good faith:

> (a) in the performance, exhibition or distribution of an artistic work; or
>
> (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
>
> (c) in making or publishing a fair and accurate report of any event or matter of public interest; or a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

5.135 However, the Department was not convinced of the merits of such a defence:

> …the offence is always to do with intentionally urging violence (either directly or indirectly by assisting an enemy). It is difficult to understand why [HREOC] would consider such conduct to be appropriate in the context of the defences they suggest as opposed to others, particularly given that urging violence against other groups in the community would appear to be consistent with the objects of Article 20 of the International Covenant on Civil and Political Rights. It far more preferable for the whole community to rely on the same defences as proposed in s.80.3 – to do otherwise is discriminatory. The danger with using special defences is that the terrorists will attempt to use education, the arts and journalism as a shield for their activities in much the same way some involved with child porn have attempted to justify their conduct.[177]

5.136 Indeed, a representative of the Department argued that the defences under the Bill were broader than the existing defences under the Crimes Act:

> In considering the defence, the court talks about taking into account whether it was intended to assist the enemy, to cause violence, to create public disorder and so on. What we have done with that part of the defence, if anything, is give it more teeth than it had before.[178]

5.137 In response to the committee's suggestions that the 'good faith' concept could be removed from the defence, the Department suggested that removing this would:

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176 HREOC, *Submission 158*, p. 30 and Recommendation 21; see also Mr Simeon Beckett, ALHR, *Committee Hansard*, 14 November 2005, p. 48 and also ALHR, *Submission 139*, pp 23-24; Mr Ibrahim Abraham, Castan Centre for Human Rights Law, *Committee Hansard*, 14 November 2005, pp 52 and 55 and *Submission 116*, p. 35 (making a similar suggestion based on the *Racial and Religious Tolerance Act 2001* (Vic)); ABC, *Submission 196*, p. 3; Media, Entertainment and Arts Alliance, *Submission 198*, p. 5; SBS, *Submission 164*, p. 4.

177 *Submission 290A*, p. 4; see also AFP, *Submission 195A*, p. 4.

178 *Committee Hansard*, 14 November 2005, p. 10.

> …open the door to people suggesting it was legitimate to urge the use of force or violence to procure changes in policy. The 'good faith' defence points to the real motivation of the person and should be retained.[179]

Defences – burden of proof

5.138 Many submissions were also concerned that the burden of proof for the defences under the sedition provisions would be on the defendant.[180] For example, the APC argued that 'it is in practice extremely difficult for defendants to prove that they acted in good faith'.[181] Similarly, the Australian Screen Directors Association argued that the provisions place an 'undue burden' on people accused of sedition to prove their innocence.[182]

5.139 Mr Chris Connolly submitted that:

> An allegation of sedition requires the accused to prove beyond reasonable doubt that they are acting in good faith. This is a rare and dangerous reversal of Australia's normal assumption that a person is innocent until proven guilty, and that the burden for proving guilt falls on the prosecution.[183]

5.140 Mr Connolly elaborated on this concern at one of the committee's hearings:

> It is quite unusual for someone such as an artist or a journalist to have to rely on a defence where the onus [of] proof is on them…It is not an impossible burden to bear—no-one is suggesting that. In fact, there are lots of crimes where if you raise a defence you do have to carry the onus of proof, but most of those crimes are incredibly difficult [to] prove in the first place, such as murder.[184]

5.141 Similarly, Mr Simeon Beckett of ALHR observed that:

> …it is quite easy to be engaged in some form of seditious conduct as a result of this bill. So you are then hauled before the courts and you are effectively required to prove your defence, be it the good faith defence in this example or perhaps a redrafted defence. If that is the case then that still has a fundamental unfairness which goes to the heart of the sedition laws. That is, effectively, the person has to prove their innocence rather than the Commonwealth or the DPP [Director of Public Prosecutions] proving that

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179 *Submission 290A*, p. 3.

180 See, for example, Liberty Victoria, *Submission 221*, p. 29; Mr Chris Connolly, *Submission 56*, p. 15; APC, *Submission 143*, p. 3; Australian Screen Directors Association, *Submission 146*, p. 3; Fairfax and others, *Submission 88*, p. 10.

181 *Submission 143*, p. 3.

182 *Submission 146*, p. 3.

183 *Submission 56*, p. 15.

184 *Committee Hansard*, 17 November 2005, p. 6.

> the person has committed a particular seditious act taking into account those freedoms that we all enjoy at the moment.[185]

5.142 Mr John North of the Law Council pointed out the problems in a media context:

> You can publish and be damned because you are going to be charged and then you can rely on good faith. How ridiculous is that for a media organisation? Will we print this? Will we publish it? We might be charged—but we have a defence…That will automatically make our media more circumspect and we do not want to see that in Australia…[T]he whole object is not to have to publish and then wonder whether you are going to be charged. The object is to have a free and robust press in this country that can question government decisions and not fear that they might be charged and then have to rely on a broadened defence.[186]

5.143 Similarly, Fairfax and others were concerned that:

> The requirement that the defendant demonstrate 'good faith' is also extraordinarily difficult if not impossible to satisfy in practice, particularly in relation to republication of third-party statements, as it may readily be negatived by, for example, a perceived lack of proportion or congruence between the opinion expressed and the facts within the publisher's knowledge at the time of publication.[187]

5.144 The committee notes that the ACT Director of Public Prosecutions, in advice to the ACT Chief Minister on an earlier draft of the Bill commented in relation to the burden of proof for these defences as follows:

> Because of the burden placed on the defendant, it is always possible that the fact will pertain but the burden will not be discharged. That is to say, the person will be found guilty although innocent. I am of the view, however, that the burden should not be very difficult to discharge in these cases, as the burden is an evidential one, then if discharged, the prosecution retains the burden of proving that the defence is not made out and must do so beyond reasonable doubt. Accordingly the offences proposed by the Bill do not appear to compromise the right to a fair trial or the rule of law.[188]

5.145 However, in response to concerns about the burden of proof for the defence, the Department submitted that:

> …the defences do not shift the legal burden of proof to the defence. The defence has to satisfy the evidential burden. This means the burden of

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185 *Committee Hansard*, 14 November 2005, p. 48.

186 *Committee Hansard*, 14 November 2005, pp 79-80.

187 *Submission 88*, p. 10.

188 ACT Director of Public Prosecutions, *Advice to the ACT Chief Minister on the Anti-Terrorism Bill 2005*, 20 October 2005, http://www.chiefminister.act.gov.au/docs/DPPadvice.pdf, p. 5 (accessed 18 November 2005).

> adducing or pointing to evidence that suggests a reasonable possibility that the defence exists (s.13.3(6) of the Criminal Code). Once the defence establishes that this reasonable possibility exists, the prosecution has to prove the defence does not exist beyond reasonable doubt. The prosecution takes this into account when making the initial decision to prosecute. No prosecutor goes to court without being in a position to counter defences of this nature.[189]

Other safeguards

5.146 As noted earlier, under proposed section 80.5, proceedings for an offence against Division 80 must not be commenced without the Attorney-General's written consent. However, this safeguard did not reassure some submitters.[190] Indeed, Mr Laurence Maher referred to this requirement as 'an illusory safeguard against prosecutorial abuse'.[191]

5.147 For example, the Justice and International Mission Unit of the Uniting Church in Australia was concerned that:

> ...this opens the legislation to being used by a Government against certain groups, while other groups that are politically aligned to the Government of the day may be able to commit sedition offences with impunity. The Unit believes that it would be better if the decision to prosecute rested with a body independent of the Government.[192]

5.148 Likewise, Mr David Bernie of the NSW Council for Civil Liberties argued that:

> We do not think the so-called safeguard about the Attorney-General's consent is a safeguard in relation to this or anything else. Unfortunately the Attorney-General…now acts as a minister in the government. In fact, having that provision in relation to sedition, rather than being a safeguard, is a matter of concern because it means that prosecutions would be politically sanctioned. In other words, for people who say things against the government which might fall under these provisions that the government of the day—be it a left-wing or a right-wing government—broadly agrees with, the prosecutions will not proceed, but for people who the government do not particularly like, they will give their imprimatur to proceed.[193]

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189 *Submission 290A*, pp 3-4.

190 See, for example, Ms Jane Stratton, PIAC, *Committee Hansard*, 14 November 2005, p. 39; Fairfax and others, *Submission 88*, p. 10; Mr David Bernie, NSW Council for Civil Liberties, *Committee Hansard*, 17 November 2005, pp 32-33; Castan Centre for Human Rights Law, *Submission 116*, p. 35; ABC, *Submission 196*, p. 3; Professor Kenneth McKinnon, APC, *Committee Hansard*, 17 November 2005, p. 2.

191 *Submission 275A*, p. 6; Mr Maher suggested this was a 'weakening of the Attorney-General's consent provision', presumably when compared to the existing section 24E of the Crimes Act.

192 *Submission 259*, p. 5.

193 *Committee Hansard*, 17 November 2005, p. 33.

5.149 In contrast, Dr Ben Saul of the Gilbert and Tobin Centre of Public Law commented that the requirement under proposed section 80.5 is 'good additional protection.'[194]

5.150 Mr Bernie of the NSW Council for Civil Liberties suggested that a statutory director of public prosecutions would be a more appropriate and independent person to determine whether a prosecution should proceed.[195] Mr John von Doussa QC, President of HREOC, agreed with this proposal, suggesting that another compelling reason for adopting such a proposal would be that:

> …it is the nature of sedition that you are dealing with speech that is potentially in the political sphere. In that context maybe it is highly desirable to remove it from somebody who is perceived to be involved in that sphere.[196]

5.151 However, a representative of the Department pointed out that the Director of Public Prosecutions (DPP) is independent, and has been since 1983. He suggested that 'the Attorney is a political safeguard on the DPP and the DPP is a safeguard on the Attorney. So where you have the Attorney's consent it is a dual process'.[197]

5.152 The Castan Centre for Human Rights Law raised concerns about the lack of guidelines for the Attorney-General under these provisions:

> We recognise that there is, in a sense, a stopgap measure on the Attorney-General having to authorise any prosecution under this legislation. Our concern is that the legislation, as outlined here, does not actually contain precise guidelines for the Attorney-General to follow. It may well be that you end up going down to issues of popularity. John Pilger might not get prosecuted, but some obscure extremist religious figure might. In terms of governance by rule of law, issues come up when you do not actually have precise and predictable legal regimes for the administration of criminal law.[198]

5.153 A representative of the Department acknowledged that such guidelines could be considered in the future review of the provisions.[199] However, the representative argued that the safeguards and defences in the legislation would be sufficient to protect situations where the focus is on criticism of government policy and

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194 *Committee Hansard*, 14 November 2005, p. 68.

195 *Committee Hansard*, 17 November 2005, p. 33.

196 *Committee Hansard*, 17 November 2005, p. 50; see further HREOC, *Submission 158B*, pp 6-8 for discussion of the UK position.

197 *Committee Hansard*, 18 November 2005, p. 19.

198 Mr Ibrahim Abraham, Castan Centre for Human Rights Law, *Committee Hansard*, 14 November 2005, p. 53; see also *Submission 116*, p. 35.

199 *Committee Hansard*, 14 November 2005, p. 10.

decisions.[200] Indeed, the representative argued that the safeguards in the Bill are 'clearer and better than they were under the old offences'.[201]

5.154 As to other safeguards, the Law Council pointed out that the Bill does not contain a requirement, currently set out under subsection 24D(2) of the current sedition provisions in the Crimes Act, that a person cannot be convicted of sedition upon the uncorroborated testimony of one witness.[202]

Penalty increase

5.155 Finally, many submissions suggested that the penalty increase for sedition offences from three years to seven years imprisonment is excessive.[203] Mr Chris Connolly pointed out that the ACT Director of Public Prosecutions has questioned the need for 'such severe penalties':

> It does not seem to me, however, that the penalty for sedition should be increased as the essence of the offence consists only of urging another to act, and does not involve any actual act of violence in itself.[204]

5.156 The committee notes that the penalty increase is in line with the recommendations of the Gibbs Report, as discussed above.[205] Further, in response to concerns about the penalty increase, the Department also submitted that:

> The Australian Government regards the conduct that is captured by the amended sedition offences as sufficiently serious as to warrant an increase in the penalty from 3 years to 7 years imprisonment.[206]

5.157 A representative of the Department pointed out that the recent UK terrorist legislation also contains a penalty of seven years imprisonment for the offence of 'encouragement of terrorism'.[207] However, the committee notes that that offence is

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200 *Committee Hansard*, 14 November 2005, pp 9-10.

201 *Committee Hansard*, 14 November 2005, p. 10.

202 *Submission 140*, p. 21; see also Mr Patrick Emerton and Mr Joo-Cheong Tham, *Submission 152*, p. 56.

203 Mr Chris Connolly, *Submission 56*, p. 15; Law Council, *Submission 140*, p. 21; Liberty Victoria, *Submission 221*, pp 29-30.

204 *Submission 56*, p. 15; quoting ACT Director of Public Prosecutions, *Advice to the ACT Chief Minister on the Anti-Terrorism Bill 2005*, 20 October 2005, http://www.chiefminister.act.gov.au/docs/DPPadvice.pdf, p. 5 (accessed 18 November 2005).

205 Gibbs Report, p. 307; Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 16; Attorney-General's Department, *Submission 290A*, Attachment A, p. 23 and Attachment B, p. 25.

206 *Submission 290A*, Attachment A, p. 23.

207 *Committee Hansard*, 18 November 2005, p. 36; also *Submission 290A*, Attachment A, p. 23 and Attachment B, p. 25.

phrased quite differently to the proposed sedition offences in Schedule 7 of this Bill.[208]

Unlawful associations

5.158 As outlined above, Item 4 of Schedule 7 of the Bill amends section 30A of the Crimes Act to provide a definition of 'seditious intention' in the provisions relating to 'unlawful associations'. The committee notes that this definition is based on the definition of 'seditious intention' currently contained in section 24A of the Crimes Act.

5.159 Nevertheless, several submissions were concerned at this proposed amendment.[209] The Gilbert and Tobin Centre of Public Law submitted that:

> It is very odd that the Bill effectively preserves the old definition of sedition in the Crimes Act for the purpose of declaring as unlawful associations which advocate a seditious intention…This results in two inconsistent meanings of sedition in federal law (one in the Crimes Act, and another in the Criminal Code).[210]

5.160 Mr Chris Connolly raised several objections to the ability to ban 'unlawful associations' under Part IIA of the Crimes Act, including that it:

- does not require any link whatsoever to force, violence or assisting the enemy;
- is not subject to any 'good faith defence' or humanitarian defence;[211]
- appears to have no link at all to terrorism; and
- is linked to an archaic definition of 'seditious intention' that covers practically all forms of moderate civil disobedience and objection (including boycotts and peaceful marches).[212]

5.161 Mr Chris Connolly concluded the unlawful associations provisions in section 30A of the Crimes Act:

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208 See clause 1 of the UK Terrorism Bill 2005, available at: http://www.publications.parliament.uk/pa/cm200506/cmbills/055/2006055.pdf (accessed 21 November 2005).

209 See, for example, Fairfax and others, *Submission 88*, p. 11; Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 19; Mr Chris Connolly, *Submission 56*, p. 4; Uniting Church in Australia, *Submission 192*, pp 5-6; Australian Screen Directors Association, *Submission 146*, p. 3; Mr David Bernie, NSW Council for Civil Liberties, *Committee Hansard*, 17 November 2005, pp 32-33; APC, *Submission 143*, p. 4; NAVA, *Submission 166*, p. 8; Liberty Victoria, *Submission 221*, p. 29; Castan Centre for Human Rights Law, *Submission 114*, pp 27-31.

210 *Submission 80*, p. 19.

211 See also Uniting Church in Australia, *Submission 192*, p. 5; and Bills Digest, pp 47-48, which suggests at p. 48 that 'if this is to be remedied, the provisions of section 24F [of the Crimes Act] need to be expressed to apply to subsection 30A(1)(b)'.

212 *Submission 56*, p. 4.

> …provide the Government with the ability to ban any organisation that opposes a Government decision and encourages protest or dissent that falls outside the law, no matter how slight or technical the breach.[213]

5.162 Similarly, the Uniting Church in Australia concluded that the definition of 'seditious intention' to be inserted by the Bill includes:

> …nonviolent civil disobedience as exemplified by religious and political leaders such as Mohandas Gandhi, Rev Dr Martin Luther King Jr, Archbishop Desmond Tutu, and a great many other prophets of history.[214]

5.163 As the Gilbert and Tobin Centre of Public Law observed, 'the law on unlawful associations is a remnant of an anti-democratic colonial era'.[215] Indeed, the committee notes that the Gibbs Report recommended the repeal of Part IIA of the Crimes Act in its entirety, including the provisions on 'unlawful associations' in section 30A.[216]

5.164 In response to the committee's questioning about the amendments to section 30A, a representative of the Department argued that Part IIA was not being 'refreshed' by the Bill, pointing out that Part IIA has 'been on the statute books for the whole time. It could have been prosecuted at any time'.[217] He further noted that 'there is no declared unlawful association that I am aware of and I do not think it has been used for a long time; I am not even aware of when it has been used.'[218] The representative also noted that an organisation declared to be an unlawful association has to be approved by the Federal Court.[219]

5.165 The Department further submitted that:

> …whether or not schedule 7 is enacted the unlawful association provisions will remain on the statute book. Schedule 7 simply preserves a definition so that the status quo is maintained. Suggestions that preserving the definition in some way re-invigorates the provisions are mistaken.[220]

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213 *Submission 56*, p. 4 and see p. 13 for examples of organisations that could potentially be banned under these provisions; see also Castan Centre for Human Rights Law, *Submission 114*, p. 28; and Fairfax and others, *Submission 88*, pp 11-12.

214 *Submission 192*, p. 6.

215 *Submission 80*, p. 19.

216 Gibbs Report, p. 335; see also Gilbert and Tobin Centre of Public Law, *Submission 80*, pp 16 and 19; Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, *Committee Hansard*, 17 November 2005, p. 3.

217 *Committee Hansard*, 18 November 2005, p. 23 and also p. 41.

218 *Committee Hansard*, 18 November 2005, p. 41; also *Submission 290A*, Attachment A, p. 21.

219 *Committee Hansard*, 18 November 2005, p. 41.

220 *Submission 290A*, p. 4.

5.166 In any case, the representative stated that he expected that this issue would be examined as part of the review promised by the Attorney-General.[221] The representative further explained that a decision had been made that this Bill 'would not deal with the unlawful associations provisions in section 30A of the Crimes Act', but the repeal of the sedition provisions in the Crimes Act meant that a consequential amendment to section 30A of the Crimes Act was required.[222] The Department also later added that 'the Government has not fully considered the need for the retention of section 30A of the Crimes Act'.[223]

Sedition - the committee's view

5.167 The committee received an overwhelming amount of evidence in relation to the sedition provisions in Schedule 7 of the Bill. With the exception of the evidence from the Department and the AFP, this evidence indicated strong opposition to the sedition offences from all sectors of the community.

5.168 The committee agrees with many of the concerns raised in relation to the sedition provisions. The committee recognises that Schedule 7 is an attempt to update and modernise the existing offences of sedition already contained in the Crimes Act. However, the committee agrees with the evidence received that the removal of Schedule 7 from this Bill, pending the review foreshadowed by the Attorney-General, would not weaken Australia's anti-terrorist capacity given the nature of the existing law in this area. In particular, the committee is not convinced of an urgent need for the provisions in light of existing laws such as the offence of treason (in section 80.1 of the Criminal Code) and the crime of incitement (in section 11.4 of the Criminal Code).

5.169 The committee acknowledges concerns about the potential impact of the sedition provisions on freedom of speech in Australia. Despite the Department's various reassurances on this issue during the committee's inquiry, the committee is troubled by evidence of the potential for 'self-censorship' by a community cautious of the potential breadth of the provisions. The committee also notes the extensive expert legal evidence to this inquiry raising serious concerns about the provisions, including the clarity of various aspects, such as the fault elements and defences.

5.170 The committee acknowledges that the Attorney-General has committed to reviewing the sedition (and advocacy) provisions of the Bill next year. In that light, the committee agrees with the evidence received that it is inappropriate to enact legislation which is considered to be in need of review.

5.171 The committee therefore recommends that Schedule 7 be removed from the Bill in its entirety, pending a full and independent review. The committee suggests this review be carried out by the ALRC. This review should examine, among other

221 *Committee Hansard*, 14 November 2005, p. 8.

222 *Committee Hansard*, 14 November 2005, p. 8.

223 *Submission 290A*, Attachment A, p. 21.

matters, the appropriate legislative vehicle for addressing the issue of incitement to terrorism. The ALRC review should also consider the need for sedition laws such as those contained in Schedule 7, as well as the existing sedition offences in Part II of the Crimes Act.

5.172 The committee also notes the concerns raised about the 'unlawful associations' provisions in Part IIA of the Crimes Act, but accepts the evidence from the Department that the amendments in the Bill are simply consequential amendments to existing provisions of the Crimes Act. Nevertheless the committee recommends that the proposed ALRC review should also examine Part IIA of the Crimes Act.

Recommendation 27

5.173 The committee recommends that Schedule 7 be removed from the Bill in its entirety.

Recommendation 28

5.174 The committee recommends that the Australian Law Reform Commission conduct a public inquiry into the appropriate legislative vehicle for addressing the issue of incitement to terrorism. This review should examine, among other matters, the need for sedition provisions such as those contained in Schedule 7, as well as the existing offences against the government and Constitution in Part II and Part IIA of the *Crimes Act 1914*.

5.175 While the committee recommends the removal of Schedule 7 of the Bill, the committee makes an alternative set of recommendations if this recommendation is not accepted. These recommendations are designed to address some of the key concerns raised in evidence in relation to the sedition provisions. In particular, the committee recommends that:

- proposed subsections 80.2(7) and 80.2(8) should be amended to require a link to force or violence and to remove the phrase 'by any means whatever';
- all offences in proposed section 80.2 should be amended to expressly require intentional urging; and
- proposed section 80.3 (the defence for acts done 'in good faith') should be amended to remove the words 'in good faith' and extend the defence to include statements for journalistic, educational, artistic, scientific, religious or public interest purposes (along the lines of the defence in section 18D of the *Racial Discrimination Act 1975*).

Recommendation 29

5.176 If the above recommendation to remove Schedule 7 from the Bill is not accepted, the committee recommends that:

- **proposed subsections 80.2(7) and 80.2(8) in Schedule 7 be amended to require a link to force or violence and to remove the phrase 'by any means whatever';**

- **all offences in proposed section 80.2 in Schedule 7 be amended to expressly require intentional urging; and**
- **proposed section 80.3 (the defence for acts done 'in good faith') in Schedule 7 be amended to remove the words 'in good faith' and extend the defence to include statements for journalistic, educational, artistic, scientific, religious or public interest purposes (along the lines of the defence in section 18D of the *Racial Discrimination Act 1975*).**

Advocacy - outline of key provisions

5.177 Schedule 1 of the Bill expands the power to proscribe terrorist organisations under the Criminal Code by including organisations that 'advocate' the doing of a terrorist act.

5.178 Under the amendments proposed by this schedule, the Minister will have a discretion to proscribe an organisation under section 102.1 of the Criminal Code if he or she is satisfied on reasonable grounds that the organisation advocates the doing of a terrorist act — whether or not the terrorist act has occurred or will occur.

5.179 New subsection 102.1(1A) will define the term 'advocates' to include situations where an 'organisation':[224]

(a) directly or indirectly counsels or urges the doing of a terrorist act; or

(b) directly or indirectly provides instruction on the doing of a terrorist act; or

(c) directly praises the doing of a terrorist act.[225]

5.180 The Explanatory Memorandum states that:

> The definition [of 'advocates'] 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.[226]

5.181 Advocating terrorism in itself will not attract criminal liability under these provisions. Rather, it may only be a ground for listing an organisation.[227] However, as a representative of the Department acknowledged during the committee's hearings, the

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224 Subsection 100.1(1) of the Criminal Code defines 'organisation' as a body corporate or an unincorporated body, whether or not the body (a) is based outside Australia; or (b) consists of persons who are not Australian citizens; or (c) is part of a larger organisation.

225 Note that section 100.1 of the Criminal Code defines 'terrorist act'.

226 p. 7.

227 p. 8.

effect of the advocacy amendments in Schedule 1 of the Bill is that 'membership and providing assistance to a listed organisation will become a serious offence in its own right.'[228] That is, if an organisation is listed as a terrorist organisation under these provisions, a range of offences relating to terrorist organisations become relevant, such as offences of:

- membership of a terrorist organisation;[229]
- providing training to, or receiving training from, a terrorist organisation;[230] or
- supporting, or associating with, a terrorist organisation.[231]

5.182 These offences contain penalties of up to 25 years imprisonment.[232]

Advocacy - key issues

5.183 Key concerns raised during the committee's inquiry about the proposed amendments relating to advocacy include:

- the impact of, and need for, the provisions;
- the breadth of the definition of 'advocate' and the nexus to terrorist activities;
- accountability of members for actions of others in their organisation; and
- concerns with the listing regime for 'terrorist organisations'.

Impact of, and need for, advocacy provisions

5.184 As with other aspects of the Bill, several submissions queried the need and justification for these provisions.[233] For example, ALHR suggested that, where a specific terrorist act is contemplated, then an organisation that directly incites another to do the act would fall within the current law prohibiting incitement, under section 11.4 of the Criminal Code.[234] The offence of incitement is discussed earlier in this chapter in the section on sedition.

5.185 AMCRAN also argued that there are already extensive offences relating to terrorist organisations, and that there is a lack of justification for the measures:

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228 *Committee Hansard*, 14 November 2005, p. 4.

229 Criminal Code, s. 102.3.

230 Criminal Code, s. 102.5.

231 Criminal Code, ss. 102.7 and 102.8.

232 See also Bills Digest, pp 7-8.

233 See, for example, Mr Joo-Cheong Tham and others, *Submission 81*, p. 32; PIAC, *Submission 142*, p. 28; Division of Law, Macquarie University, *Submission 168*, p. 6; Federation of Community Legal Centres (Vic), *Submission 167*, p. 10; AMCRAN, *Submission 157*, p. 11.

234 *Submission 139*, p. 6.

> …no evidence has been put forward to show that it would provide any measure of safety to the Australian people. Specifically, no clear justification has been given as to why the addition of 'advocating terrorism' as a listing criterion is necessary to prevent ideologically or religiously motivated violence or to strengthen security.[235]

5.186 The Federation of Community Legal Centres (Vic) noted the Explanatory Memorandum's justification, as outlined earlier in this chapter, that the communications and conduct covered by the definition of 'advocates' are 'inherently dangerous' because they could inspire a person to cause harm to the community.[236] However, in the Federation's view:

> …to say that such conduct 'could' inspire a person to commit terrorist acts actually indicates a tenuous link to actual terrorist acts. It does not, therefore, warrant the characterisation of 'inherently dangerous'. In turn, it is not justifiable to ban any organisation that has such tenuous links to actual terrorist activity.[237]

5.187 The Department further elaborated on the justification contained in the Explanatory Memorandum by providing examples of the type of conduct that the legislation is aimed at, including:

> …where the organisation has arranged for the distribution of a book that tells young people that it is their duty to travel overseas and kill Australian soldiers stationed in another country. Another [example] might be where the organisation puts a message on a web site following a terrorist act stating that it was a brave act that should be repeated.[238]

5.188 However, many submissions were also concerned that the consequences of an organisation being listed under the proposed provisions could result in potentially severe penalties for members under the offences relating to terrorist organisations.[239] As outlined above, some of these offences provide for penalties of up to 25 years imprisonment. As the Federation of Community Legal Centres (Vic) pointed out:

> These offences attract very serious sentences and most of them do not require actual knowledge, mere recklessness is enough. The possibility that people may be charged with such serious offences for simply being reckless in their connections with an organisation that merely praises the doing of a

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235 *Submission 157*, p. 11; see also Dr Waleed Kadous, AMCRAN, *Committee Hansard*, 17 November 2005, p. 21.

236 Explanatory Memorandum, p. 7.

237 *Submission 167*, p. 10; see also Division of Law, Macquarie University, *Submission 168*, p. 6.

238 *Submission 290A*, Attachment A, p. 7.

239 See, for example, Dr Waleed Kadous, AMCRAN, *Committee Hansard*, 17 November 2005, pp 21-22; Federation of Community Legal Centres (Vic), *Submission 167*, p. 11.

> terrorist act is an unjustifiable extension of Australia's counter-terrorism laws.[240]

5.189 Similarly, Mr Joo-Cheong Tham and others questioned the proportionality of the measures, arguing that if an organisation is listed under the provisions:

> This seems to impose a 'blanket' punishment that could affect hundreds of people, not on the basis of involvement in any terrorist act, but merely on the basis of a connection to an organisation that has, for example, a stated policy that people of occupied lands have the right to resist occupation.[241]

5.190 A representative of the Department told the committee that:

> Once an organisation is listed in the regulations as a terrorist organisation and that is gazetted, if you are a member of that organisation you need to cease that membership…otherwise you do find yourself committing an offence.[242]

5.191 Several submissions also criticised these amendments on the policy basis that they would limit freedom of speech.[243] For example, the Federation of Community Legal Centres (Vic) expressed its view that:

> In a liberal democracy it is not desirable that the executive be empowered to ban organisations for simply expressing praise for certain acts (however abhorrent those acts may seem to the broader public). It is the fundamental basis of any open, democratic society that its members be able to freely express their opinions, regardless of the content of those opinions. This amendment seriously jeopardises this fundamental precept.[244]

5.192 Similarly, Ms Agnes Chong of AMCRAN told the committee that:

> Our view is that criminal measures are a crude tool to use against such points of view and it is likely to be seen by the community as the government suppressing legitimate points of view that it could not oppose on the basis of reason or logic.[245]

5.193 PIAC submitted that:

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240 *Submission 167*, p. 11.

241 *Submission 81*, p. 33; see also, for example, AMCRAN, *Submission 157*, p. 13.

242 *Committee Hansard*, 18 November 2005, p. 25.

243 See for example, ALHR, *Submission 139*, p. 5; Mr Joo-Cheong Tham and others, *Submission 81*, p. 32; PIAC, *Submission 142*, p. 28; Islamic Women's Welfare Council of Victoria, *Submission 150*, p. 3; AMCRAN, *Submission 157*, pp 11-12 and see also Ms Agnes Chong, AMCRAN, *Committee Hansard*, 17 November 2005, pp 19-20; Federation of Community Legal Centres (Vic), *Submission 167*, pp 9-10; Division of Law, Macquarie University, *Submission 168*, p. 6; Liberty Victoria, *Submission 221*, p. 35. Note also that freedom of speech issues are discussed further in the section on sedition earlier in this chapter.

244 *Submission 167*, pp 9-10.

245 *Committee Hansard*, 17 November 2005, p. 20.

> …the approach of proscription on expanding bases is not an effective approach. It over-criminalises ordinary acts, including critical or dissenting speech, and criminalises, by association, others who may not be aware of or share the views expressed.[246]

5.194 PIAC suggested that Schedule 1 be amended to require the Minister to consider the effect of any such proscription upon certain human rights, such as freedom of expression and freedom of association. They further suggested that any regulation that proscribes an organisation as a terrorist organisation should be accompanied by a Human Rights Impact Statement.[247]

5.195 The Division of Law at Macquarie University also queried the constitutional validity of the provisions due to their impact on freedom of speech.[248] First, citing the Communist Party Case,[249] the Division argued that:

> A law that criminalises organisations challenges fundamental constitutional protections of freedom of speech contained in the rule of law and the separation of powers, both of which limit the extent of Commonwealth legislative power.[250]

5.196 It also argued that it could breach the implied constitutional freedom of political communication, on the basis that 'expressing opinions about the merits of terrorist activity in the name of a political or ideological cause is, by its nature, political.'[251]

5.197 The Gilbert and Tobin Centre of Public Law made no comment on the implied constitutional freedom of political communication, but did suggest that the provisions may infringe the express constitutional protection of the free exercise of religion in section 116 of the Constitution. It also felt that they could violate Australia's obligation to protect freedom of association under Article 22 of the ICCPR, since 'it is disproportionate to restrict the association of the harmless many to suppress the association of a harmful few.'[252]

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246 *Submission 142*, p. 28; see also Ms Jane Stratton, PIAC, *Committee Hansard*, 14 November 2005, p. 33.

247 *Submission 142A*, pp 9-10; see also Ms Jane Stratton, PIAC, *Committee Hansard*, 14 November 2005, p. 33; PIAC, *Submission 142*, p. 28.

248 *Submission 168*, pp 5-6.

249 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

250 *Submission 168*, p. 5.

251 *Submission 168*, p. 5; see also Mr Joo-Cheong Tham and others, *Submission 81*, p. 7.

252 *Submission 80*, p. 6.

5.198 As with other aspects of the Bill, it was also suggested that these amendments may have a particular impact on Muslim community groups.[253] For example, AMCRAN put forward the argument that Muslim community groups:

> …may wish to express solidarity with Muslims who are under the thumb of either oppressive regimes or various kinds of occupying forces. This is particularly the case, as the definition of a terrorist act makes no distinction between legitimate liberation and independence movements and terrorism. Examples of such situation would include commentary on Palestinian oppression at the hands of Israeli occupiers; and groups calling, on the basis of things like the torture in Abu Ghraib, that America and its allies be forced out of Iraq by any means necessary. It is our view that the above point of view, while unpalatable to some, should not be limited.[254]

5.199 However, Dr Waleed Kadous of AMCRAN acknowledged, in response to the committee's questioning, that 'there is not a clear line or a distinction between resistance movements and terrorism'.[255] Nevertheless, Dr Kadous told the committee that the current definition of 'advocates' is 'too broad' and:

> The perception in the Muslim community will be that the reason the laws are being introduced is to prevent open discussion because they cannot be handled through the normal course of debate and logic that occurs…When I met with approximately 10 religious leaders on Saturday to discuss the sedition offences, it was their perception that these laws were tailored to them. I had to convince them that they were not tailored to them. I was in the unusual position of having to defend this particular legislation and say that I really do not think this is targeted at the Muslim community. It has an undue impact on the Muslim community but that is not the same thing as saying it is targeted at the Muslim community.[256]

Definition of 'advocates' and nexus to terrorist activities

5.200 Submissions variously described the proposed definition of 'advocates' in Schedule 1 as 'too broad', 'vague', 'uncertain' and 'unclear'.[257] Proposed paragraph (c), which refers to an organisation that directly praises the doing of a terrorist act, was

253 See, for example, Islamic Women's Welfare Council of Victoria, *Submission 150*, p. 3; AMCRAN, *Submission 157*, p. 12.

254 *Submission 157*, p. 12.

255 *Committee Hansard*, 17 November 2005, p. 20.

256 *Committee Hansard*, 17 November 2005, p. 21.

257 See, for example, Mr David Bernie, NSW Council for Civil Liberties, *Committee Hansard*, 17 November 2005, p. 33 and also *Submission 161*, p. 16; AMCRAN, *Submission 157*, p. 12; Dr Waleed Kadous, AMCRAN, *Committee Hansard*, 17 November 2005, pp 20-21; Liberty Victoria, *Submission 221*, p. 35.

particularly criticised for being 'too broad' and for not requiring clear connection to terrorist-related activities.[258]

5.201 For example, the Federation of Community Legal Centres (Vic) was concerned that the amendments would sever 'the link between proscription and concrete acts of political violence, particularly insofar as indirect counselling of a terrorist act or mere praise of a terrorist act may trigger proscription.'[259]

5.202 The NSW Council for Civil Liberties expressed concern that the provisions would cover:

> …organisations not involved in any terrorist activity but [which] are expressing opinions about terrorist activity. This is clearly unacceptable. Any Tamil or Palestinian support organisations could be banned under these provisions… The present proposals have a flavour of political suppression about them which is unacceptable in any democracy. Banning of organisations on the basis of alleged advocacy rather than activities is fraught with danger.[260]

5.203 In the same vein, AMCRAN argued that:

> A particular concern with any broadening of the existing grounds for the listing of organisations as 'terrorist' would be the severing of any required nexus between proscription, and the organisation's link to acts of political violence. For example, an organisation may become liable to proscription simply on the grounds that it has voiced support for a political struggle somewhere in the world.[261]

5.204 Mr Patrick Emerton and Mr Joo-Cheong Tham were similarly concerned that:

> Given the very large number of community, religious and political organisations in Australia and around the world which from time to time express praise for acts of political violence – whether that be commending the United States on its invasion of Iraq, or expressing support for organisations resisting oppressive regimes – this is a very real power to target organisations and their members on the basis of nothing more than their political or religious orientation.[262]

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258 See, for example, the Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 6; PIAC, *Submission 142*, p. 28; Mr Patrick Emerton and Mr Joo-Cheong Tham, *Submission 152*, p. 51; Federation of Community Legal Centres (Vic), *Submission 167*, p. 10; Division of Law, Macquarie University, *Submission 168*, p. 3; Dr Ameer Ali, Australian Federation of Islamic Council, *Committee Hansard*, 17 November 2005, p. 28; Ms Jane Stratton, PIAC, *Committee Hansard*, 14 November 2005, p. 33.

259 *Submission 167*, p. 10.

260 *Submission 161*, p. 17.

261 *Submission 157*, p. 11.

262 Mr Patrick Emerton and Mr Joo-Cheong Tham, *Submission 152*, p. 51.

5.205 In contrast, the committee notes that the Explanatory Memorandum states that 'the advocacy would need to be about [a terrorist] act, not generalised support of a cause'.[263] Indeed, a representative of the Department told the committee that broad, general statements supporting resistance movements would not come under the proposed provisions – the statements would advocating terrorism would need to praise a specific, violent terrorist act.[264]

5.206 Indeed, the Department submitted that the definition of 'advocates' 'achieves the right balance, and is not too broad'.[265]

5.207 However, the committee notes that recent similar proposals in the UK would enable the proscription of organisations that promote or encourage terrorism, including activities which 'glorify' acts of terrorism (which includes any form of praise or celebration). However, it was pointed out to the committee that the UK proposal is limited to circumstances where a reasonable person would infer the act should be emulated.[266]

5.208 In relation to concerns that the definition of 'advocates' is too broad, the Department submitted that:

> It should be borne in mind that the definition of 'advocates' (and the offences that rely on that definition) only relates to the process for listing a terrorist organisation in regulations, a process that contains significant safeguards and limitations, including requiring consultation with the States and with the leader of the Opposition. In contrast with the other types of terrorist organisations under the Criminal Code, it is not possible to prove an offence of, for example, association with a terrorist organisation that advocates terrorism, unless that organisation has been listed in regulations. This is regarded as a significant additional safeguard relating to the advocacy definition.[267]

5.209 The committee asked the Department whether the provisions, particularly paragraph (c) of the definition of 'advocates', could be amended to include some qualifying words. One suggestion for qualifying words was to require that the praise is made with the intention, or in circumstances where it is likely to have the effect, of creating a substantial risk of a terrorist act occurring. A representative of the

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263 p. 7.

264 *Committee Hansard*, 18 November 2005, pp 20-21; also *Submission 290A*, Attachment A, p. 7.

265 *Submission 290A*, Attachment A, p. 7.

266 NOWAR SA, *Submission 255*, p. 3; see also Dr Ameer Ali, Australian Federation of Islamic Council, *Committee Hansard*, 17 November 2005, p. 28 and clause 21 of the UK Terrorism Bill 2005, available at: http://www.publications.parliament.uk/pa/cm200506/cmbills/055/2006055.pdf (accessed 21 November 2005).

267 *Submission 290A*, Attachment A, p. 7.

Department responded that such an amendment would probably be within the scope of the policy of the provision.[268]

Accountability of members for actions of others in their organisation

5.210 Several submissions suggested that the advocacy provisions in Schedule 1 raise issues of accountability of members for the statements of others in their group – statements which other members may not even agree with.[269] For example, AMCRAN submitted that:

> …there is vagueness as to what is meant for an organisation to 'advocate' terrorism. Does it mean that the leader of the organisation has made comments on one occasion publicly 'advocating terrorism'? Is there a requirement that the comments be made on multiple occasions? Is it sufficient for someone on the forums of a web site to have made statements advocating terrorism? Or is advocacy limited to it being stated as one of the doctrines of the organisation? This is very different from the doing of a terrorist act, which clearly requires logistical support and coordinated acts, rather than the speech of a single individual.[270]

5.211 In the same vein, Mr Bernie of the NSW Council for Civil Liberties pointed out that the advocacy provisions do 'not indicate at what level an organisation would be said to be advocating terrorism. Is it because one member says it? Is it because a leader says it? Or is it if it is in the aims of the organisation?'[271]

5.212 Likewise, PIAC was concerned that:

> An organisation risks being proscribed on the basis that a member, who is not necessarily representative of the organisation, advocates the doing of a terrorist act or praises the commission of such an act. This then has a flow on effect to other members of the organisation through the fact that membership of a proscribed organisation is, in itself, a criminal offence.[272]

5.213 The Gilbert and Tobin Centre of Public Law described the amendments in Schedule 1 of the Bill as:

> …an extraordinary extension of the power of proscription and of criminal liability, since it collectively punishes members of groups for the actions of

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268 *Committee Hansard*, 18 November 2005, p. 16; see also *Submission 290A*, Attachment A, p. 7.

269 See, for example, AMCRAN, *Submission 157*, pp 12-13 and also Dr Waleed Kadous, AMCRAN, *Committee Hansard*, 17 November 2005, p. 22; NTEU, *Submission 159*, p. 5; Mr David Bernie, NSW Council for Civil Liberties, *Committee Hansard*, 17 November 2005, p. 33 and also *Submission 161*, pp 16-17; Division of Law, Macquarie University, *Submission 168*, p. 3; Ms Jane Stratton, PIAC, *Committee Hansard*, 14 November 2005, p. 33; PIAC, *Submission 142*, p. 28.

270 *Submission 157*, p. 12.

271 *Committee Hansard*, 17 November 2005, p. 33.

272 *Submission 142*, p. 28.

> their associates beyond their control. It is also misapplication of criminal law to trivial harm, when criminological policy presupposes that criminal law should be reserved for the most serious social harms.[273]

5.214 The Gilbert and Tobin Centre of Public Law submitted that:

> While it may be legitimate to ban groups which actively engage in, or prepare for, terrorism, it is not justifiable to ban whole groups merely because someone in it praises terrorism. It is well accepted that speech which directly incites a specific crime may be prosecuted as incitement. It is quite another matter to prosecute a third person for the statements of another; even more so when such statements need not be directly and specifically connected to any actual offence.[274]

5.215 The Centre raised the following example as a problematic possibility:

> …places of religious worship…may be closed down merely because someone in it praised a terrorist act, such as where a preacher asks God to grant victory to the mujahedeen in Iraq. This would collectively punish all worshippers for the view of a wayward leader.[275]

5.216 As the Parliamentary Library's Bills Digest pointed out:

> 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.[276]

5.217 AMCRAN suggested in its submission that, at the very least, the criteria for 'advocating' on behalf of an organisation should be clarified. AMCRAN suggested that possible criteria could include that:

> (i) the statements are made by the acknowledged leader of the organisation; and
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> (ii) the statements are made on official material distributed or speeches given by the leader; and
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> (iii) the statements are made in public conversation; and
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> (iv) the statements are made on more than 5 occasions.[277]

5.218 In response to the committee's questioning on this issue, a representative of the Department responded that all the circumstances would need to be carefully considered, and that a range of evidence would be required to establish 'whether there

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273 *Submission 80*, p. 6.

274 *Submission 80*, p. 6.

275 *Submission 80*, p. 6.

276 p. 9.

277 *Submission 157*, p. 13; see also Dr Waleed Kadous, AMCRAN, *Committee Hansard*, 17 November 2005, p. 24.

was a similarity of mind about a particular organisation'.[278] The representative suggested that the comments of an individual alone would not result in an organisation becoming listed, even if that person were the leader of the organisation. Rather, the whole conduct of the organisation would need to be examined to determine whether the advocacy was an 'organisational position'.[279]

5.219 A representative of the Department further explained that the sedition offences (in Schedule 7) are offences aimed at individuals, whereas the amendments to section 102.1 target organisations who advocate sedition.[280]

5.220 The committee queried whether an individual offence of advocating terrorism (with appropriate defences) could be included in Schedule 1 of the Bill, instead of the proposed new sedition offences in Schedule 7 of the Bill.[281] A representative of the Department raised some concerns with this proposal, noting that, unlike the sedition provisions, it would require a reference of power from the states because it would then come within the terrorism provisions. However, he acknowledged that this issue could be considered in the Attorney-General's review of the proposed provisions.[282]

5.221 The committee also notes that, in the Bill's second reading speech, the Attorney-General appears to indicate that the Security Legislation Review Committee could have this matter referred to it for consideration and review:

> I will be asking that committee to examine some issues relevant to individual advocacy which have been raised with me.[283]

Concerns with the existing proscription regime

5.222 The Division of Law at Macquarie University expressed concern that amendments in Schedule 1 give the Minister a broader power to proscribe a wide range of organisations, without sufficient safeguards and guidance in the legislation to ensure that the Minister will exercise his or her discretion responsibly.[284]

5.223 However, a representative of the Department pointed out that, under the process for proscribing terrorist organisations:

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278 *Committee Hansard*, 18 November 2005, p. 21; see also AFP, *Committee Hansard*, 17 November 2005, p. 75; and AFP, *Submission 195A*, p. 9.

279 *Committee Hansard*, 18 November 2005, pp 16-17 and 25.

280 *Committee Hansard*, 14 November 2005, pp 4 and 8.

281 Senators Mason and Brandis had queried whether, instead of seeking to revise sedition laws, it would be more effective to criminalise incitement or advocacy by both organisations and individuals of the doing of a terrorist act: *Committee Hansard*, 18 November 2005, p. 22.

282 *Committee Hansard*, 18 November 2005, p. 23 and see also p. 22.

283 The Hon Philip Ruddock MP, *House of Representatives Hansard,* 3 November 2005, p. 68.

284 *Submission 168*, p. 4.

> The listing does not occur without consultation with the states and the making of regulations, which can be disallowed.[285]

5.224 The Bills Digest also notes that the Parliamentary Joint Committee on ASIO, ASIS and DSD may review a regulation specifying an organisation as a terrorist organisation.[286]

5.225 Nevertheless, several submissions were critical of the existing proscription regime under the Criminal Code, and for them, these provisions simply compounded their existing concerns.[287] For example, Mr Joo-Cheong Tham and others suggested that:

> The proposal to extend the listing criteria to cover organisations that advocate terrorism would only exacerbate the problems that have been persistently identified in relation to the existing proscription regime.[288]

5.226 Mr Joo-Cheong Tham and others concluded:

> The proposal to extend the criteria would substantially increase this confusion and lack of transparency. In particular, the adoption of vague concepts such as 'advocating' terrorism would only serve to exacerbate the arbitrary nature of the proscription regime.[289]

5.227 Similarly, the Federation of Community Legal Centres (Vic) stated that it:

> …is in principle opposed to the proscription of organisations by the Executive, particularly with such broad discretion, expansive criteria and limited judicial oversight as result from the legislative regime around proscription. Broadening the proscription power only heightens these concerns.[290]

5.228 The Federation of Community Legal Centres (Vic) also raised concerns about the breadth of the existing definition of 'terrorist act' in section 100.1 of the Criminal Code when combined with the proposed amendments. It argued that:

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285 *Committee Hansard*, 14 November 2005, p. 4; see also Bills Digest, p. 7, which notes that 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 comment on the proposed regulations'.

286 p. 7; see also Attorney-General's Department, *Committee Hansard*, 18 November 2005, p. 25.

287 See, for example, Mr Joo-Cheong Tham and others, *Submission 81*, p. 31; AMCRAN, *Submission 157*, p. 10; Federation of Community Legal Centres (Vic), *Submission 167*, pp 9-11.

288 *Submission 81*, p. 31.

289 *Submission 81*, p. 32.

290 *Submission 167*, p. 9.

> The expansiveness of this definition [of 'terrorist act'] coupled with the Minister's wide discretion to proscribe means that [any further] extension of this power is of serious concern.[291]

Advocacy - the committee's view

5.229 The committee acknowledges that the Attorney-General has committed to reviewing the advocacy provisions in Schedule 1 of the Bill (along with the sedition offences proposed by Schedule 7 of the Bill). Once again, the committee queries the wisdom of enacting provisions which are already considered to be in need of review. However, in the case of the advocacy provisions in Schedule 1, the committee accepts that advocating terrorism will not in itself attract criminal liability under these provisions, but is merely a ground for listing an organisation as a 'terrorist organisation'. The committee further recognises that this listing is subject to parliamentary scrutiny under the existing provisions for listing terrorist organisations under the Criminal Code.

5.230 The committee notes concerns about the process for listing 'terrorist organisations' under the Criminal Code, but considers that the concerns with these existing provisions are outside the scope of this inquiry. Further, the committee recognises that this is a matter which can be considered by the Security Legislation Review Committee in its review of existing counter-terrorism laws.

5.231 However, the committee acknowledges the concerns raised in evidence and submissions about Schedule 1 of the Bill, including in relation to the potential breadth of the definition of 'advocates'. Therefore, the committee recommends that the amendments in Schedule 1 of the Bill be included in the proposed review by the ALRC, as recommended in relation to Schedule 7 above.

5.232 The committee also supports suggestions that individual advocacy could be included in this Schedule, but notes that the Attorney-General has stated in his second reading speech that this matter will be considered by the Security Legislation Review Committee in its review of existing counter-terrorism laws.

Recommendation 30

5.233 The committee recommends that the amendments in Schedule 1 of the Bill, relating to advocacy of terrorism, be included in the proposed review by the Australian Law Reform Commission as recommended above in relation to Schedule 7.

5.234 However, as an interim measure pending this ALRC review, the committee recommends two amendments be made to the provisions. First, the committee acknowledges concerns raised about the breadth of the definition of 'advocates' and

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291 *Submission 167*, p. 9; see also Ms Jane Stratton, PIAC, *Committee Hansard*, 14 November 2005, p. 33 and PIAC, *Submission 142*, p. 28; Liberty Victoria, *Submission 221*, p. 35.

the fact that only a distant nexus to actual terrorist activities appears to be required under the provisions. In this context, the committee is particularly concerned that paragraph (c) of the definition of advocates merely refers to situations where an organisation 'directly praises the doing of a terrorist act'.

5.235 The committee therefore recommends that paragraph (c) of the definition of 'advocates' in the Bill be qualified to require that the praise is made with the intention, or is made in circumstances where it is likely to have the effect, of creating a substantial risk of a terrorist act occurring. The committee notes that the Department acknowledged in its evidence that this proposal would be consistent with the policy objectives of the provisions.

Recommendation 31

5.236 The committee recommends that proposed paragraph (c) of the definition of 'advocates' in Item 9 of Schedule 1 be amended to require that the praise be made with the intention, or in circumstances where it is likely to have the effect, of creating a substantial risk of a terrorist act occurring.

5.237 The committee also recognises concerns about the lack of clear criteria for determining the circumstances under which advocacy of terrorism can be attributed to an organisation. The committee particularly notes concerns that members of an organisation might be accountable for actions of others in their group which are beyond their control. The committee therefore recommends that the definition of 'advocates' in Schedule 1 be amended to include criteria to clarify the circumstances to be taken into account in deciding whether the advocacy of terrorism is an 'organisational position'. In this context, the committee notes the suggestion by AMCRAN that possible criteria could include, for example, that the statements advocating terrorism are made by the acknowledged leader of the organisation; are made on official material distributed or speeches given by the leader or organisation; and the statements are made on multiple occasions.

5.238 The committee considers that this is consistent with the evidence from the Department that these sorts of matters would be considered in any case before an organisation could be listed under these provisions. For example, the Department told the committee that single statements by individual members would be unlikely to be attributed to the organisation as a whole. However, the committee believes that this should be clarified by expressly including relevant criteria in the legislation.

Recommendation 32

5.239 The committee recommends that the proposed definition of 'advocates' in Item 9 of Schedule 1 be amended to include criteria to clarify the circumstances to be taken into account in determining whether an 'organisation' may be considered to 'advocate terrorism'. This criteria could include, for example, that the statements advocating terrorism are made by the acknowledged leader of the organisation; are made on official material distributed or speeches given by the leader or organisation; and the statements are made on multiple occasions.

CHAPTER 6

LAW ENFORCEMENT AND ASIO POWERS

Introduction

6.1 This chapter will outline the key provisions and issues raised in relation to the following aspects of the Bill:

- the extension of police powers to stop, question and search persons in relation to terrorist acts; and to seize items related to terrorism and other serious offences (Schedule 5);
- the introduction of powers to permit police to directly issue a notice to produce information and documents from persons and organisations for the purposes of investigating terrorism and other serious offences (Schedule 6); and
- the expansion of the scope of ASIO's powers (Schedule 10).

Powers to stop, question and search persons in relation to terrorist acts – outline of key provisions

6.2 Schedule 5 of the Bill amends the Crimes Act to expand the powers of the AFP, and state and territory police forces to stop, question and search persons for the purposes of investigating and preventing terrorism. It also enables police to seize items related to terrorism and other serious offences.[1]

6.3 The Explanatory Memorandum to the Bill states that the provisions will 'dovetail' with equivalent state and territory stop, question and search powers, and will provide a common approach for police operating in a 'Commonwealth place' (which includes airports).[2] The Bill also creates the proposed concept of a 'prescribed security zone': the Minister may declare a Commonwealth place to be a 'prescribed security zone' for 28 days (unless earlier revoked) if the Minister considers that a declaration would assist in either preventing, or responding to, a terrorist act (proposed section 3UJ).

6.4 The declaration of a 'prescribed security zone', and any subsequent revocation, are not legislative instruments (proposed subsection 3UJ(7)). This means that

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1 A 'serious offence' is an offence punishable by imprisonment for 2 years or more (including, for example, theft of property belonging to a Commonwealth entity (section 131 of the Criminal Code), money laundering (section 400 of the Criminal Code), some postal offences (under Division 471 of the Criminal Code), and computer offences (under Division 478 of the Criminal Code)).

2 *Explanatory Memorandum*, p. 74. The states and territories will introduce complementary legislation to cover other major transport hubs.

declarations need not be tabled in Parliament and are not subject to disallowance. There is a requirement to broadcast any declaration by television or radio so as to be capable of being received within the 'prescribed security zone', and published in the *Gazette* and on the Internet. However, there is no requirement that publication occur within a particular timeframe or as soon as practicable. Further, failure to broadcast or publish does not invoke any sanction, nor does it invalidate a declaration (proposed subsections 3UJ(5)-(6)).

6.5 Any person who is in the 'prescribed security zone' during the period of the declaration may be subject to the stop, search, questioning and seizure powers.

6.6 Proposed subsection 3UK sets out the sunset clause for the proposed stop, question, search and seizure powers. The sunset clause does not expressly provide for any of the relevant provisions to cease to have effect after 10 years; rather it appears to allow the proposed police powers to remain in legislation, yet be unable to be exercised.[3]

Stop, question and search powers

6.7 Proposed Subdivision B of Division 3A of the Bill sets out the application and scope of the powers to stop, question and search. Proposed section 3UB provides that the powers may only be exercised where 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 be about to commit, be committing, or has just committed, a 'terrorist act';[4] or if a person is in a Commonwealth place in a prescribed security zone.

6.8 Proposed subsection 3UC(1) gives police officers the power to ask a person for the following details:

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

6.9 It is an offence to not comply with such a request, or to give false information (proposed subsection 3UC(2)). The offence carries a maximum fine of $2200; however the more serious offence of obstruction, hindering or intimidating a Commonwealth official in the execution of his/her duties may also apply, which carries a maximum penalty of imprisonment for 2 years.[5] Proposed subsection 3UC(3)

3 Moreover, some provisions will need to remain in force after 10 years to provide for circumstances such as the return of items which were seized prior to the 10-year sunset date.

4 A 'terrorist act' is defined in subsection 100.1(1) of the Criminal Code.

5 See section 149.1 of the Criminal Code.

provides a reasonable excuse defence to the offence created by proposed subsection 3UC(2).

6.10 Proposed subsection 3UD(1) provides a police officer with the power to stop and detain a person for the purpose of searching for a terrorism-related item. Searches that may be conducted include an ordinary search or frisk search (not a strip search), and a search of a vehicle owned or operated by the relevant person.

6.11 A police officer may use reasonable force but must not use more force or create greater indignity than is reasonable or necessary; or detain the person for longer than reasonably necessary to conduct the search (proposed subsections 3UD(2) and (3)).

Seizure of items

6.12 Proposed section 3UE provides for the seizure of terrorism-related or serious offence-related items found in the course of a search conducted under proposed section 3UD. Proposed sections 3UF and 3UG set out how items seized under proposed section 3UE must be dealt with.

6.13 For example, items seized during searches are subject to a notification system, which requires police to serve a seizure notice on the owner within 7 days, identifying the items and informing the owner of their right to request (within 90 days) the return of the item (proposed subsections 3UF(1)-(3)). The police may retain an item where there are reasonable grounds to suspect the item is likely to be used in the commission of a terrorist act or serious offence (proposed subsection 3UF(6)); or is evidence of a terrorist act or serious offence (proposed subsection 3UF(7)).

6.14 When the owner requests return of a seized item, and the relevant police officer does not return it within the time limits, the police officer may apply to a magistrate for orders that:

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

6.15 A magistrate may also make an order for the return of the item to its owner (proposed subsection 3UG(5)). In any application to a magistrate under proposed subsection 3UG, the owner of the item must be allowed to appear and be heard by the magistrate (proposed subsection 3UG(2)).

Powers to stop, question and search persons in relation to terrorist acts – key issues

6.16 Some of the key concerns raised in the committee's inquiry in relation to the proposed expansion of police powers to stop, search and question, and seize items, include:

- the necessity of expanding the powers (given the scope and nature of existing police powers);
- the broad and random nature of the powers;
- the possible impact of the proposed powers on specific ethnic, religious or racial groups, and, in particular, the Muslim community;
- the highly discretionary nature of the Minister's power to declare an area a 'prescribed security zone';
- seizure of items related to serious (non-terrorism) offences; and
- the need for independent oversight of the use of the powers.

Need for the new powers

6.17 Many submissions expressed in-principle opposition to the enhanced police powers contained in Schedule 5 of the Bill. Specifically, they questioned the need and justification for the proposed powers, particularly in light of the breadth of existing Commonwealth and state and territory police powers.

6.18 For example, the Federation of Community Legal Centres (Vic) argued that AFP officers are already afforded a wide range of stop, search, question and detain powers under the *Australian Federal Police Act 1979* (AFP Act);[6] and state and territory police are also 'generally able to stop and question a person where it is reasonably suspected that the person is committing or has just committed a criminal offence'.[7] Further, in its view:

> …police powers with respect to terrorism offences are already overly coercive and expansive. Many of the powers provided for in Schedule 5 already exist in some form and are sufficient in themselves. The additional powers sought are in our view an excess of police power.[8]

6.19 PIAC agreed with this assessment:

> In PIAC's view it is unnecessary to extend police powers in this way. State and Federal police already have extensive powers to stop, question, search, detain and arrest people in relation to suspected terrorist offences and other serious offences. The Government has failed to explain why these powers

6 For example, see AFP Act, ss. 141 and 143.

7 *Submission 167*, pp 34-35.

8 *Submission 167*, p. 35.

> are now seen as inadequate, and why a new regime of police powers needs to be introduced into the *Crimes Act.* PIAC notes that the Explanatory Memorandum to the Bill states that the provisions will 'dovetail with equivalent State and Territory stop, question and search powers'. However, in PIAC's view the proposed provisions go beyond what already exists in State and Territory legislation and are likely to result in front-line policing practices that are arbitrary, intrusive and potentially discriminatory.[9]

6.20 In their submission, Mr Joo-Cheong Tham and others also argued that Commonwealth and state and territory police currently 'wield extensive powers to stop, search, detain, question and arrest in relation to 'terrorism' offences' and that, further, the AFP 'are presently empowered by a variety of intersecting laws with broad coercive investigative, preventive and surveillance powers as well as extensive stop, search and question powers'.[10]

6.21 The Australian Political Ministry Network (PolMin) agreed, and emphasised that a far wider range of people would come within the ambit of such broad police powers:

> The proposals also seek to extend "stop, question and search" powers where "there *might* be reasonable grounds that a person *might* have just committed, *might* be committing, or *might* be about to commit a terrorism offence". Both State and Federal police already wield extensive powers to stop, search and question in relation to terrorism offences. The proposals if adopted clearly mean that a much wider range of people may be subject to detention, restrictions on movement and compulsory questioning. Giving the police such free rein to use coercive powers when there is only a *possibility* of an offence, opens the door to mistakes and abuse.[11]

6.22 In evidence, Ms Agnes Chong from AMCRAN told the committee that many of the new powers contained in the Bill, including the random stop and search powers, 'mirror existing powers but with the safeguards removed or weakened'.[12] AMCRAN's submission argued that:

> …the range of powers that are available to both Federal and State Police forces are more than sufficient to combat terrorism, especially in light of desirability of Governments to cooperate. As we saw with the recent raids, they were more than enough to raid, search, detain and arrest persons allegedly to have been involved in terrorism. We further note that they did not even need to resort to the broader NSW police powers to conduct those raids and arrests. In our view, the proposed amendments unnecessarily broaden the powers of the AFP to stop, question and search persons.[13]

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9 *Submission 142*, p. 34.

10 *Submission 81*, p, 19.

11 *Submission 162*, p. 4.

12 *Committee Hansard*, 17 November 2005, p. 19.

13 *Submission 157*, p. 25.

6.23 In their submission, Mr Patrick Emerton and Mr Joo-Cheong Tham expressed concern that little justification has been given by the Federal Government as to why greater discretionary police powers are needed. Their submission contained a useful comparison between, on the one hand, some of the existing powers and inherent safeguards in the Crimes Act and the AFP Act; and, on the other, the Bill's considerable expansion of police powers with few corresponding safeguards.[14]

6.24 For example, Mr Emerton and Mr Tham pointed out that the stop and question powers in the Bill would allow the AFP 'to demand people's reasons for being in a place' and would eliminate 'the connection to a crime that it is believed might have taken place'.[15] By contrast, the current stop and question powers vested in police by the Crimes Act are limited to circumstances in which a police officer believes on reasonable grounds that the person whose name and address is sought 'may be able to assist…in inquiries in relation to an indictable offence that the constable has reason to believe has been or may have been committed'.[16] Further, unlike the Crimes Act, the Bill does not oblige a police officer to identify himself or herself at the request of the person he or she is questioning.[17]

6.25 Mr Emerton and Mr Tham argued further that:

> No explanation has been offered of how the vesting of greater discretionary and coercive powers in the AFP will prevent acts of political or religious violence. Currently, if an AFP member suspects on reasonable grounds that a person is attempting to commit a terrorist act, or is engaged in preparation for or planning of a terrorist act, or has in his or her possession any document or other thing connected to such preparation or planning, then the AFP member can arrest that person. This then triggers a number of powers, as well as accountability and review mechanisms, under the *Crimes Act*.[18]

6.26 The Australian Privacy Foundation (APF) submitted that '(t)he extent to which the provisions not only in Schedule 5 but also in various other schedules to the Bill…are 'new' or differ from existing powers is not clear'.[19] Further:

> If they are different, then this must be better justified. What *is* clear is that the powers will apply to a much wider range of individuals, including those who are not even suspected of criminal offences. There must be more debate about the proportionality of applying these powers to such people.[20]

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14 See *Submission 152*, pp 36-39.

15 *Submission 152*, p. 38.

16 Crimes Act, s. 3V. See further *Submission 152*, p. 38.

17 Crimes Act, subs. 3V(3).

18 *Submission 152*, p. 39.

19 *Submission 165*, p. 5.

20 *Submission 165*, p. 5.

6.27 In a joint submission, the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security pointed out that the proposed 'powers to stop, search and require identification…may cause disagreement or confrontation when exercised, leading to complaints'.[21]

Broad and random nature of the powers

6.28 Many submissions and witnesses criticised the extremely broad nature of the proposed powers in Schedule 5, as well as their likely random application. There were also strong criticisms of the lack of statutory criteria to regulate and standardise the exercise of the powers, and the lack of connection of the power to the alleged 'terrorist act'. Given that the proposed powers allow police to stop, question and search persons where there is only the *possibility* of an offence being committed (or about to be committed), arguably the current threshold for the use of such coercive powers would be lowered considerably.[22]

6.29 PIAC contended that '(t)he proposed powers are exercisable on the basis of unacceptably wide discretions that are a recipe for inconsistent and arbitrary policing practices'.[23] In particular, it noted the breadth of some of Schedule 5's key provisions:

> The repeated use of the word 'might' in clause 3UD(1)(a) is likely to encourage the exercise of the powers on the basis of vague possibilities rather than concrete evidence. The fact that the powers are exercisable by a broad spectrum of policing authorities raises the potential for inconsistent application of the 'reasonable suspicion' test across different police forces.
>
> Of even greater concern is clause 3UB(1)(b), which will allow the powers to be triggered simply because a person happens to be in a 'prescribed security zone' in a Commonwealth place. In these circumstances, not even a reasonable suspicion test applies. Anyone can be stopped, searched and questioned, simply because they happen to be in particular area at a particular time. This is an unacceptable interference [with] the right to freedom of movement and the right to privacy and has the potential to lead to inefficient policing practices and to undermine trust and confidence in the police. We note that police in the United Kingdom have been criticised for using similar powers too widely.[24]

6.30 Mr Patrick Emerton and Mr Joo-Cheong Tham were of the view that '(r)ather than increasing the safety of Australians, the vesting of broad discretionary police powers which are not subject to effective review is a recipe for discrimination and racial or ethnic profiling, with all the [related] adverse consequences'.[25]

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21 *Submission 163*, p. 7.

22 For example, see Mr Joo-Cheong Tham and others, *Submission 81*, p. 4.

23 *Submission 142*, p. 34.

24 *Submission 142*, pp 34-35.

25 *Submission 152*, p. 39.

6.31 The NSW Council for Civil Liberties argued that the proposed powers are excessive. It suggested that use of the powers in a 'prescribed security zone' is particularly offensive, given that they are not contingent on a requirement of reasonable suspicion:

> They give police extraordinary powers to search, seize and demand details from *anyone* in a prescribed security zone – without the requirement of reasonable suspicion. So if the Attorney-General were to declare Sydney International airport a prescribed security zone, then everyone in the airport could be searched, have items seized and their personal details recorded. The requirement of reasonable suspicion should not be removed. It is not a crime simply to *be* in a public Commonwealth place.[26]

6.32 The Federation of Community Legal Centres (Vic) expressed their concerns as follows:

> Police would also be offered very broad discretion in that, pursuant to the amended Section 3UB(a) they need only suspect on reasonable grounds that a person '*might* have just committed, be committing or be about to commit such an act. Both the concept of 'reasonable suspicion' and the term 'might' give rise to the extremely broad discretion here. As a result, it is almost certain that these powers will cause far more people to come into contact with police, including a majority who do not pose any threat to the community. This is particularly concerning given the humiliating impact public police searches and questioning may have on people that are subject to this kind of policing. The discretionary nature of these powers is such that there is also the danger that the powers will be misused. The Federation is concerned that these powers will be used for collateral purposes that are not aimed at apprehending criminal offenders, for example to gather intelligence or for harassment or targeting of individuals.[27]

6.33 In a joint submission, the Bar Association of Queensland and the Queensland Law Society noted the lack of safeguards contained in Schedule 5 to counteract the expansion of the powers:

> Safeguards relating to the conduct of the search including a prohibition upon the search taking any longer than is reasonably necessary or that a person is always given the opportunity to open a search item before using force to open it or damage it. No specific consequences are provided for failing to comply with the condition of the search.[28]

Impact on particular groups

6.34 Many submissions and witnesses argued that the measures taken in the Bill in relation to stop, search, question and detain powers will inevitably lead to ethnic,

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26 *Submission 161*, p. 17.

27 *Submission 167*, p. 35.

28 *Submission 222*, p. 34.

religious or racial profiling by exposing minority communities to over-policing and arbitrary interference. In particular, there were serious concerns that the Muslim community would be unfairly targeted.

6.35 For example, Mr Joo-Cheong Tham and others argued that discriminatory application of the powers was highly likely:

> …the extension of AFP powers to provide a pre-emptive authority based on what someone 'might' do, risks the discriminatory and blanket application of stop and search powers. Stop and search powers operate at the level of 'street policing' and have a history of controversial application, exposing particularly vulnerable minority communities to overpolicing and arbitrary interference. Research demonstrates such powers are routinely used for purposes other than 'apprehending criminals', such as gathering intelligence, harassment and punishment along ethnic lines. Heavy-handed forms of policing such as the regular use of stop and search powers, particularly where used in conjunction with racial profiling have proven counter-productive to terrorism investigation through the alienation of communities [citing C Cunneen, *Conflict, Politics and Crime, Aboriginal Communities and the Police* (2001); J White, *Defending the Homeland, Domestic Intelligence, Law Enforcement and Security* (2004)].[29]

6.36 Importantly:

> 'Reasonable suspicion' as a trigger for the exercise of police power represents a powerful discretion to determine levels of action and to interpret law. Coercive powers, together with increased discretionary power, give the police an extended freedom to characterise a situation as giving rise to a 'terrorist offence'. Given the exceptionally broad range of activity, which can fall within a 'terrorism' offence, these extended police powers are likely to increase police interaction with those who are not a threat to security. In such circumstances, the discretionary aspect of increased police power presents a formidable threat to basic freedoms.[30]

6.37 The Federation of Community Legal Centres (Vic) stated that it too was 'worried about the discriminatory use of the powers in prescribed security zones, where no reason for exercising the powers to stop, search and question will be required'.[31] Further:

> There is already a disproportionate focus on the Muslim community by the media, law enforcement agencies, intelligence gathering agencies and the broader community whenever the issue of terrorism is raised. We are concerned that the Muslim community will be subject to further disproportionate and arbitrary police interference as a result of these powers. Police targeting of the Muslim community is clearly an undesirable

29 *Submission 81*, pp 20-21.

30 *Submission 81*, p. 21.

31 *Submission 167*, pp 35-36.

> outcome and may even have a counter-productive effect with respect to criminal investigation, insofar as an alienated community is less likely to be cooperative with police investigations. Most importantly, however, over-policing along racial or religious lines that is facilitated by legislation amounts to officially sanctioned racial and religious discrimination. It also has the danger of perpetuating and even exacerbating racial and religious prejudice in the broader community. This should be something that our society is working to counteract, rather than enacting laws that are inherently prone to discriminatory application such as these.[32]

6.38 In a similar vein, Dr Philip Claxton argued that:

> [The random stop and search powers coupled with the Minister's discretion to declare an area a 'prescribed security zone' mean that] the police…need not even reach the very low threshold of suspecting that a terrorist act "might" be committed: the scope for widespread abuse of those seen as suspect…will be most acutely felt by those seen as terrorists, and the danger of racial and religious stereotyping again raises its ugly head.
>
> This in turn will widen the gulf between Muslims and other sections of Australian society as Muslims are forced to become the feared "other": this will inevitably lead to a backlash against ordinary Muslims personally who will be seen as the cause of the current problems Australia is currently touted as suffering from. At particular risk are Muslim women who are visibly Muslim and who will inevitably be subjected to the indignity of a bodily search which requires the headscarf to be removed to be searched in public - there is currently no provision which requires the search to take place in private. Again this will further alienate the Muslim community and serve to marginalise even moderate Muslims.[33]

6.39 Ms Agnes Chong from AMCRAN also highlighted the potential impact of the Bill on the Muslim community, with particular reference to its weakened safeguards:

> The problem with the weak safeguards [in the Bill] is that they increase the chance of innocent people being caught by the bill. And, let us face it, the reality is that these people will be likely to be Muslims. The weaker test allows for the spectre of racial profiling, whether official or unofficial, to arise. Each miscarriage of justice and use against innocent people would cause ripples of fear and disempowerment through the Muslim community. More dangerously, it also undermines the spirit of cooperation that must exist between Muslims and the wider community if terrorism is to be fought.[34]

6.40 Dr Waleed Kadous from AMCRAN commented on the message the Bill may send to the Muslim community at large:

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32 *Submission 167*, p. 36.

33 *Submission 131*, p. 3.

34 *Committee Hansard*, 17 November 2005, p. 19.

> The important thing to realise is that legislation is not just about law; it is about social messages. And the message that these laws send out to the community is that Muslims are to be suspected, whether that is intended or unintended. I had a conversation with a senior member of the AFP recently. I discussed with him the possibility that, under these new laws, racial profiling may happen. He assured me that it is not within his power to guarantee that racial profiling will not happen. Similarly, it is not within my power to guarantee that the introduction of these laws will not lead to people susceptible to radical ideas falling for them as a consequence of what they see as being railroaded, marginalised, by, for example, not being able to say what they really think on a particular issue.[35]

6.41 The Islamic Women's Welfare Council of Victoria expressed concern that the stop and search powers would unfairly target certain members of the Muslim community:

> We are concerned that this will lead to racial profiling and that Muslims are more likely to be searched. Young Muslim men are already vulnerable to racial profiling. Furthermore, it may cause community backlash against Muslims as people would be likely to blame them for any inconvenience they experience because of an area being locked down as a "security zone".[36]

6.42 Further:

> There is also a particular issue for women who wear hijaab (head scarf), niqaab and chador (traditional Islamic dress which also covers part of/or full face) who might be requested to remove their hijab/niqaab/chador as part of a search. There is no requirement that the search be conducted in private and this will be a source of great distress for women. We believe that fear of random stop and search powers; will further isolate women for fear of being searched publicly or being searched by male officers. It also appears that Muslim men are more likely to be stopped in relation to these matters (this has been demonstrated by the fact that all the raids in relation to terrorism have been conducted on Muslims) and therefore, their wives, daughters or other women who might be accompanying them are again vulnerable to the policing measures targeting Muslim men.[37]

6.43 Several other submissions also expressed concern at the particular impact of the stop and search powers on Muslim women, including the lack of privacy safeguards in the Bill and the lack of a requirement that searches be carried out by police officers of the same sex as the person being searched.[38] The National Children's

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35 *Committee Hansard*, 17 November 2005, p. 26.

36 *Submission 150*, p. 3.

37 *Submission 150*, p. 3.

38 For example, see Mr Patrick Emerton and Mr Joo-Cheong Tham, *Submission 152*, p. 38; AMCRAN, *Submission 157*, p. 26; Bar Association of Queensland and Queensland Law Society, *Submission 222*, p. 34; Devasia family, *Submission 225*, p. 2.

and Youth Law Centre, and the Hon Alastair Nicholson and others, noted the possible impact of the powers on young people, particularly young people of ethnic background or appearance.[39] PIAC expressed concern that 'the proposed police questioning powers will impact adversely on marginalised and vulnerable social groups', including the homeless, the mentally ill, and those with intellectual disabilities.[40]

6.44 PIAC also pointed out that the use of similar police powers in the UK is subject to independent oversight:

> Unrestricted coercive powers of the type envisaged have the potential to encourage racial profiling and discrimination. There is a danger that decisions by front-line police as to who they will stop, search and question will be affected by commonly held prejudices and stereotypes, eg, that Muslims are terrorists. This may result in particular ethnic, cultural and religious groups being targeted in the exercise of the powers, eg, young men of Arab or Muslim appearance, women wearing the hijab. There is evidence that similar stop and search powers in the United Kingdom have impacted disproportionately on people of colour. The United Kingdom Government has responded to concerns about racially discriminatory application of its anti-terror laws by requiring police to keep records of each stop and search that they carry out and by setting up a Stop-and-Search Action Team, which includes community representatives, to review how the powers are being exercised and to produce a guidance manual for all police forces.[41]

Highly discretionary nature of the power to declare a 'prescribed security zone'

6.45 Some submissions objected to the highly discretionary nature of the Minister's power to declare a 'prescribed security zone' under proposed section 3UJ.

6.46 In this regard, PIAC submitted that:

> There are no guidelines in the Act as to the criteria that have to be satisfied before a place is declared a prescribed security zone, and no requirement that the Minister make his or her decision on the basis of reliable intelligence or information. Although a procedure is set out requiring the Minister to publish the declaration, the declaration remains effective notwithstanding a failure to follow this procedure. Wide, unfettered discretion of this nature is unsatisfactory, given the potential adverse implications that the declaration of an area as a prescribed security zone may have for people who live or work in the area.[42]

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39 *Submission 211*, p. 5; *Submission 237A*, p. 8.

40 *Submission 142*, p. 36.

41 *Submission 142*, p. 35.

42 *Submission 142*, pp 35-36.

6.47 Mr Patrick Emerton and Mr Joo-Cheong Tham expressed a similar view:

> Given the breadth of the definition of 'terrorist act', the broad grounds on which the Minister may make a declaration of a place as a 'prescribed security zone', and the lack of any requirement that the Minister's declaration be based on reasonable grounds, means that the circumstances in which these powers are able to be invoked may be very broad.[43]

6.48 In its joint submission, the Bar Association of Queensland and the Queensland Law Society pointed out that the 'effectiveness of publication [of the Minister's declaration of a 'prescribed security zone' under proposed section 3UJ in the Gazette and on the Internet] seems questionable as a failure to properly publish the declaration has no consequences whatsoever'.[44]

Seizure of items related to 'serious offences'

6.49 The committee received some evidence which was critical of the proposed power to seize items for 'serious offences' (non-terrorism offences), particularly in light of the stated purpose of the Bill to prevent and combat terrorism.

6.50 The Federation of Community Legal Centres (Vic) argued that this part of Schedule 5 reaches beyond the scope of the Bill, effectively amounting to a misuse of anti-terrorism legislation to increase police powers with respect to ordinary crime:

> In our view, the inclusion of 'serious offences' in Schedule 5 is inexplicable and exceeds the scope of this Bill. Schedule 5 provides that, when conducting searches for a terrorism related item, police are permitted to seize and potentially retain any 'serious offence related items' found. A serious offence is specifically not a terrorism offence, rather, this term includes drug offences and those relating to fraud. This would seem to be an attempt to arm police with further powers to assist in policing non-terrorism offences via legislation purportedly aimed only at countering terrorism – an extension of police powers by stealth. We submit that any powers relating to serious offences are clearly misplaced in this Bill. We are concerned that the Government is exploiting public concerns regarding terrorism to extend police powers with respect to ordinary crime. Any increased police powers with respect to serious offences should be removed from the Bill.[45]

6.51 Mr Michael Cordover made a similar argument:

> Search powers may be used in order to obtain evidence to be used in non-terrorism-related trials. This is a misuse of the additional powers being granted in the name of national security.[46]

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43 *Submission 152*, p. 37.

44 *Submission 222*, p. 33.

45 *Submission 167*, pp 36-37.

46 *Submission 134*, p. 24.

6.52 The NSW Council for Civil Liberties agreed:

> The provisions…extend beyond the professed purpose of the Bill (to prevent terrorism) and will apply to all federal indictable offences. There is no justification for extending these extraordinary powers to non-terrorist offences.[47]

6.53 At one of the committee's hearings, Mr Cameron Murphy, from the NSW Council for Civil Liberties, expanded on its concerns with respect to the search and seizure provisions of Schedule 5 (and the notice to produce regime under Schedule 6, discussed in detail later in this chapter):

> It effectively dispenses with any need for a search warrant. That is what this does. It is so broad that you can effectively conduct a search through search and seizure powers or a notice to produce and obtain anything you like. It is not limited in that sense to terrorism offences. It fundamentally changes the protection that the law has provided for people's privacy. It eliminates it. Searches can take place and you will not need a warrant any more. You can simply ask someone to produce anything that you wish in relation to an investigation. I have said in the past that it allows ordinary criminal matters to suddenly morph into terrorism investigations. If you cannot obtain a search warrant in a tax evasion matter or some other criminal matter then suddenly it can become a terrorism investigation and you can obtain the evidence that way. That is the real danger.[48]

Need for independent oversight of the powers

6.54 Some submissions noted that, unlike the situation in the UK where the exercise of similar police powers is subject to independent oversight, the Bill does not contain any accountability mechanisms.

6.55 Liberty Victoria argued that:

> The grant and subsequent exercise of such extraordinary stop and search powers require a system of comprehensive independent auditing of the use of the powers. This is particularly so given there is absence of a Bill of Rights to provide a constitutional or legislative framework against which the grant and exercise of the powers can be judged. However, even where a Bill of Rights is in place the need for regular independent random auditing of the exercise of the powers is necessary to maximize the protection of the public from the abuse of power.[49]

6.56 Similarly, the National Children's and Youth Law Centre argued that, due to the strong possibility of racial profiling:

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47 *Submission 161*, p. 17.

48 *Committee Hansard*, 17 November 2005, p. 42.

49 *Submission 221*, p. 33.

> …the exercise of those policing powers requires special protection and review. Mechanisms for individual and systemic complaint, review and redress are required. Such mechanisms must be public, independent and externally accountable.[50]

Justification of the proposed powers

6.57 The committee heard evidence from the AFP and the Department which provided some background to, and rationale for, the Bill. The committee also took the opportunity to question the AFP and the Department in relation to some of the specific concerns raised by submissions and witnesses about the new police powers in Schedule 5.[51]

6.58 A representative from the AFP told the committee that the Bill addresses limitations in the current counter-terrorism legislative framework which have become apparent recently. This includes:

> …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. Terrorism is different from other offences that the AFP investigates in that its outcomes are much more unpredictable and potentially catastrophic. The AFP needs appropriate powers to respond to that threat. These powers will be used judiciously and cautiously to protect the community.[52]

6.59 The representative submitted further that:

> What we are confronted with here is a new environment and new terrain where we are being tasked by the community to prevent terrorism from occurring in this country. As part of our operational activity we are seeing things occurring, we are highly disturbed by what we are seeing and we are having to exercise judgments which are at the very upper end of risk management to ensure that we can act before a terrorist act occurs. This is a very onerous responsibility for the security agencies and law enforcement. What we need are the tools to be able to intervene at an earlier period of time without having to wait until all of the evidence may be in place because, as we get towards that particular point, that becomes an inexact science. The risks to the community of something catastrophic happening are very real. This suite of measures is not a grab for power…and it is not something that the AFP does in any way without absolute consideration and great thought. But, from our operational experience, it will allow us to at least have a chance of preventing such activity.[53]

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50 *Submission 211*, p. 5.

51 Answers to relevant questions on notice put by the committee to the AFP and the Department are at Appendix 4 and Appendix 6 respectively.

52 *Committee Hansard*, 17 November 2005, p. 54.

53 *Committee Hansard*, 17 November 2005, pp 67-68.

6.60 The representative provided specific justification for the increased stop, search, question and seize powers as follows:

> …the London and Madrid bombings in particular demonstrate the need for police to have the appropriate powers to ensure that areas of mass gathering and public transport facilities are safe. The proposed extended powers are necessary to increase the AFP's capacity to prevent terrorist attacks and to respond effectively to attacks in a way that is consistent with the police in other jurisdictions. The AFP presently does not have the power to stop a person who may be acting suspiciously and ask basic questions as to their identity and purpose nor can the AFP search any suspicious items that a person may be carrying.[54]

6.61 A representative from the Department provided the committee with an explanation of the reason why seizure of items related to serious offences is included in Schedule 5:

> Where it comes in is that you have to be doing the stopping and questioning and so on in relation to a serious terrorism offence. However, if you find something when you are doing that questioning that relates to a serious offence then there are some provisions that deal with what you may do with that evidence.[55]

Powers to stop, question and search persons in relation to terrorist acts – the committee's view

6.62 The committee notes the concerns raised in submissions and evidence with respect to the proposed powers to stop, question, search and detain persons in relation to terrorist acts; and the power to seize items, including those related to serious offences. The committee shares some of these concerns. However, at the same time, the committee recognises the operational imperatives driving the measures contained in the Bill and is cognisant of the fact that strong police capabilities are essential to respond to, and combat, the threat of terrorism.

6.63 In line with these views, the committee believes that certain safeguards could usefully be included in Schedule 5 to counteract the potentially broad and arbitrary reach of the proposed powers. The inclusion of several statutory safeguards and checks on the use of the powers will serve to better protect civil liberties, such as the right to privacy. In the committee's view, this would provide a more balanced approach without impacting unduly on the exercise of the powers.

6.64 The committee considers also that there is a need for independent oversight of the powers. Therefore, the committee recommends that the Commonwealth Ombudsman be tasked with comprehensive oversight powers of the use of the proposed powers in Schedule 5. The committee emphasises the importance of, and

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54 *Committee Hansard*, 17 November 2005, p. 55.

55 *Committee Hansard*, 18 November 2005, p. 42.

strongly encourages, effective engagement of the Commonwealth Ombudsman in the accountability process.

6.65 The committee also recommends that the sunset clause applicable to Schedule 5 be amended to apply for a period of five years, in light of the stated purpose of the Bill as a specific and exceptional response to the threat of terrorism.

Recommendation 33

6.66 The committee recommends that all police who exercise the new stop, question, detain, search and seizure powers under Schedule 5 of the Bill be required to undergo comprehensive training as to their obligations under Commonwealth and state and territory discrimination legislation.

Recommendation 34

6.67 The committee recommends that proposed section 3UD of Schedule 5 of the Bill be amended to include a requirement that, as far as possible, body searches are to be conducted in private.

Recommendation 35

6.68 The committee recommends that proposed section 3UD of Schedule 5 of the Bill be amended to include a requirement that body searches be carried out by police officers of the same sex as the person being searched.

Recommendation 36

6.69 The committee recommends that Schedule 5 of the Bill be amended to include a requirement that all police forces keep comprehensive records in relation to any exercise of the proposed stop, question, detain, search and seizure powers in Schedule 5.

Recommendation 37

6.70 The committee recommends that the Commonwealth Ombudsman be tasked with comprehensive oversight of the use of the proposed stop, question, detain, search and seizure powers under Schedule 5 of the Bill.

Recommendation 38

6.71 The committee recommends that the sunset clause applicable to Schedule 5 be amended to apply for a period of five years.

Recommendation 39

6.72 The committee recommends that the Bill be amended by inserting an express requirement for a public and independent five year review of the operation of Schedule 5.

Power to obtain information and documents – outline of key provisions

6.73 Schedule 6 amends the Crimes Act to introduce powers to permit authorised AFP officers to directly issue a notice to produce information and documents from operators of aircraft or ships (for example, in relation to persons or things on board), which relate to the doing of a 'terrorist act' (whether or not a 'terrorist act' has occurred or will occur) (proposed section 3ZQM); and to a person or organisation who may have information or documents relevant to the investigation of a 'serious terrorism offence' (proposed section 3ZQN).

6.74 Schedule 6 also allows for a Federal Magistrate, on application by AFP officers, to issue a notice to produce documents which will assist in the investigation of a 'serious offence' (offences punishable by imprisonment of 2 years or more, not including serious terrorism offences) (proposed section 3ZQO). The power to issue such a notice is conferred on a Federal Magistrate in a personal capacity and not as a court or member of a court (proposed section 3ZQQ).

6.75 The provisions allowing for notices to produce to be issued 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) which may have in their possession or control documents such as transaction records, financial accounts and telephone records (proposed section 3ZQP). These might be relevant to determining, for example:

- whether an account is held by a specified person with a specified financial institution, and details relating to the account (proposed subsection 3ZQP(a));
- whether a specified person travelled or will travel between specified dates or specified locations, and details related to the travel (proposed subsection 3ZQP(d)); or
- who holds a specified telephone account and details relating to the account (proposed subsection 3ZQP(h)).

6.76 These provisions significantly widen the current powers of the AFP in relation to seizing documents relating to serious offences without a warrant.

6.77 Proposed section 3ZQR provides that documents requested under a notice given under either proposed section 3ZQN or 3ZQO must be produced. A person is not excused from producing a document on the following grounds (proposed subsection 3ZQR(1)):

- 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 (that is, legal professional privilege and other duties of confidence are waived 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); or

- production would otherwise be contrary to the public interest.

6.78 However, proposed subsection 3ZQR(2) provides an immunity to ensure that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court or indirectly, to gather other evidence against the person. The only exception to this immunity relates to 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.

6.79 Failure to comply with a notice to produce documents or information under proposed sections 3ZQN or 3ZQO is an offence punishable by a fine of $3300 (proposed subsection 3ZQS).

6.80 Proposed section 3ZQT creates an offence relating to the disclosure of the existence or nature of a notice issued under proposed sections 3ZQN or 3ZQO. The penalty for breach of the non-disclosure provisions is $13200 or 2 years imprisonment or both. There are some exceptions to the non-disclosure provisions, including disclosure to obtain a document required by the notice; disclosure for the purposes of obtaining legal advice or representation in relation to the notice; or disclosure in the course of legal proceedings.

Power to obtain information and documents – key issues

6.81 Key issues raised in the committee's inquiry in relation to the power to obtain information and documents include:

- the broad nature of the power and lack of accountability safeguards;
- the potential impact of the notice to produce regime on the duty of journalists not to reveal their sources; and
- the application of the regime to investigation of serious (non-terrorism) offences.

Broad nature of the power and lack of accountability

6.82 Many submissions and witnesses objected strongly to particular aspects of the proposed notice to produce regime. In particular, many noted the broad nature of the powers conferred on police by the Bill's vague statutory criteria, and the lack of associated oversight and accountability mechanisms.

6.83 For example, Mr David Bernie from the NSW Council for Civil Liberties told the committee that the notice to produce regime:

> …is probably one of the clearest provisions in this whole legislation. The police have the power. There is no problem with the power. They have search warrant power. If they need to they can do it through the existing search warrant powers. All that is happening here is the removing of a safeguard. It is effectively removing the safeguard of having to go and get a

> warrant. That is what is happening here. It is not a case of, 'Oh, gee, police need more powers to fight terrorism.' They have those powers. They can get search warrants. They can get questioning warrants under the ASIO Act. All sorts of warrants are available. What this is doing is removing a safeguard—a safeguard that we have always had in common law countries.[56]

6.84 Mr Cameron Murphy from the NSW Council for Civil Liberties noted further that:

> It is not difficult for the police to obtain a warrant in circumstances where there is some evidence or suspicion of wrongdoing. They can do that quite easily. We are not aware of any instances where the police have had a problem as part of an investigation. There is no real justification for this removal of a check and balance at all.[57]

6.85 The Gilbert and Tobin Centre of Public Law also submitted that the new regime allows the police a wide-ranging power because, unlike a search warrant (and as it applies to terrorism-related activities), there is no independent check on its use:

> [The regime is] plainly designed to circumvent the usual procedures for obtaining evidence under a search warrant, which include the requirements that a magistrate issue the warrant and only when satisfied by information on oath that there are reasonable grounds for suspecting that there is, or soon will be, evidence on the premises (Div 2, *Crimes Act 1914* (Cth)). The Bill does not provide the independent safeguard of an issuing magistrate, nor the additional evidentiary requirement that suspicion be based on information on oath.[58]

6.86 The Gilbert and Tobin Centre of Public Law drew an interesting analogy with the notice to produce powers already conferred on the Australian Securities and Investment Commission and the Australian Competition and Consumer Commission.[59] However:

> The complexity of corporate entities does not apply in the same way to terrorist offences, so the rationale for notices to produce in the corporate context cannot be readily transplanted. While notice to produce powers may be helpful in investigating terrorism, departing from ordinary criminal investigative procedures (and their attendant protections for privacy and liberty) is only justifiable if accompanied by the independent safeguard of an issuing magistrate.[60]

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56 *Committee Hansard*, 17 November 2005, p. 42.

57 *Committee Hansard*, 17 November 2005, p. 42.

58 *Submission 80*, p. 15.

59 See *Australian Securities and Investment Commission Act 2001*, s. 33; *Trade Practices Act 1974*, s. 155.

60 *Submission 80*, p. 15.

6.87 In evidence, Dr Ben Saul from the Gilbert and Tobin Centre of Public Law reiterated the views expressed in its submission, stressing also that the regime has the potential to interfere with various types of confidential relationships. Having said that, however, he acknowledged that the notice to produce regime in the Bill contains some limitations:

> …the Attorney-General has publicly stated that this process is designed purposely to bypass the regular search warrant procedure, and so there must be some kind of intention behind it to make it easier to gather evidence. On the other hand, the notice to produce is relatively restrictive because it only allows you to gather certain kinds of fairly limited information, and so on that basis we are not absolutely against this measure. We do think, however, it should be subject to the protection of an issuing magistrate. The concern is that the notice to produce may interfere in legal professional privilege as well as other kinds of confidential relationships—protection of journalists' sources, for example, and protection of clients in noncriminal or non-civil proceedings—because, although the bill preserves use immunity, it does not preserve legal professional privilege absolutely. Think of refugee cases, for example, where there is no court proceeding on foot; there is simply an administrative process before the department of immigration. You have no use immunity there and therefore refugee lawyers have to effectively dob in their clients.[61]

6.88 PIAC also noted that the regime in Schedule 6 'breaks from the usual legal processes and protections in relation to the obtaining of documents relevant to an investigation'.[62] It observed, with concern, that certain privileges are abrogated under the proposed regime:

> The Schedule also provides that no privileges apply to permit a person to refuse disclosure of a document. As such, documents normally protected under legal professional privilege lose that protection under these provisions. Similarly, it removes the usual evidentiary protection against a person being required to give evidence that may 'tend to prove that the [person] has committed an offence against … an Australian law'.[63]

6.89 Further:

> These processes are a departure from usual criminal procedures with the absence of the requirement that such notices be issued under a court's authority and the absence of any protection against self-incrimination and a limited protection of legal professional privilege.

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61 *Committee Hansard*, 14 November 2005, p. 65.

62 *Submission 142*, p. 37.

63 *Submission 142*, p. 37.

> Where there is a risk of self-incrimination or a claim of legal professional privilege, there ought properly be a process for these matters to be determined by a properly constituted court.[64]

6.90 The APF argued that '(n)o justification has been provided as to why information cannot be obtained by using existing search warrant provisions, subject to judicial oversight'.[65] Indeed, it posed a pertinent question:

> If time is a factor, why not just spend resources on the availability of judges to approve warrants?[66]

6.91 In their submission, Mr Patrick Emerton and Mr Joo-Cheong Tham made similar comments about the broad grounds for use of the proposed powers:

> These powers will be able to be exercised without any need for a warrant being issued, and without the involvement or supervision of any judicial or independent authority. Failure to provide the information or document will be a strict liability offence. There is no express protection of the privilege against self-incrimination, although this might result from defence of 'reasonable excuse'. The burden will be placed on an accused who does not have the information or documents to adduce evidence of this in his or her defence.[67]

6.92 Similarly to the Gilbert and Tobin Centre of Public Law, Mr Emerton and Mr Tham were mindful of the limitations of the regime. However, in their view, these limitations were not enough to temper the power:

> The Bill limits the documents that are subject to a notice to produce to various matters including details of financial accounts, funds transfer, dealings in assets, travel, utility accounts, telephone bills and residence. Nevertheless, this power gives the AFP the capacity to build up extensive dossiers of information on individuals or companies that they are interested in, potentially in secret.[68]

6.93 Mr Emerton and Mr Tham pointed out that such capacity is particularly pertinent in the context of terrorism-related offences:

> This is particularly so in the case of the powers relating to 'terrorism offences', which may be exercised, and subjected to secrecy, without the supervision of any judicial or independent authority. Although the AFP's use of this power is stated to be limited to investigation of terrorism offences, in practice this will be a difficult constraint to enforce, as the party against whom the demand is made will not be in a good position to contest

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64 *Submission 142*, p. 37.

65 *Submission 165*, p. 5.

66 *Submission 165*, p. 5.

67 *Submission 152*, p. 40.

68 *Submission 152*, p. 41.

> the issue simply by virtue of not having the relevant information. Moreover, if the AFP chooses to impose a secrecy requirement, the person who is suspected of engaging in a terrorist offence will have no knowledge that these demands are being made in relation to their personal or business information. Giving the police such free rein opens the door to mistakes and abuse.[69]

6.94 Further, the potential for 'secret police dossiers' raises issues with respect to civil liberties which are exacerbated by the lack of statutory criteria in the Bill for use, handling and storage of the relevant information or documents.[70]

6.95 The Federation of Community Legal Centres (Vic) raised similar issues in the context of application of the regime to passenger information held by aircraft and ship operators. Specifically, they noted the lack of sufficient connection between the information or document sought and 'a terrorist act' under proposed section 3ZQM:

> Given the invasion of privacy involved in the exercise of these powers, we submit that a closer nexus between the information/document sought and a terrorist act should be required. It is conceivable that, as currently framed, the Bill empowers the AFP to request an extraordinarily expansive array of information and documents. As with any intrusive state powers, these powers should be kept to the minimum required for their purpose. In this respect, this Bill does not conform to this principle.[71]

6.96 Notably, in their joint submission, the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security suggested that, in order to lessen the potential for disagreement or confrontation, the Bill should be amended to contain:

> …some specification…which would safeguard against extensive "incidental" collection of information which is contained in documents requested for a specific purpose, particularly where the material may be of a sensitive nature (eg medical information).[72]

6.97 The Australian Privacy Foundation (APF) also argued that proposed section 3ZQT presents 'an unacceptable obstacle to accountability' since it prevents anyone served with a notice to produce from informing any other person (other that those involved in responding to the notice, and the person's own legal advisers).[73]

6.98 The Office of the Privacy Commissioner (OPC) made some pertinent comments about the breadth of the proposed notice to produce regime in the context of the *Privacy Act 1988* (the Privacy Act). Generally, the OPC noted that:

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69 *Submission 152*, pp 41-42.

70 *Submission 152*, p. 42.

71 *Submission 167*, pp 37-38.

72 *Submission 163*, p. 7.

73 *Submission 165*, p. 5.

> The result of this Bill being enacted would be to permit greater collection of personal information by the AFP including from private sector organisations, without warrant. While such collection and disclosure would comply with the AFP's obligations under the Privacy Act, as it would be authorised by law, careful consideration should be given to the enactment of such powers as they may detract from the intent and spirit of the Privacy Act.[74]

6.99 And further:

> In expanding the powers of law enforcement agencies, this Schedule invests a significant degree of unilateral authority in law enforcement officers going about their required duties with no corresponding guidance as to how this authority should be exercised. Specifically, the test required to request documents is: the authorised AFP officer "believes on reasonable grounds" and the officer must determine what is "relevant to". There is no obvious guidance on how these subjective terms should be interpreted, posing the risk that they may be interpreted broadly. The Office suggests that such powers should be accompanied by guidance as to how they should be executed.[75]

6.100 The OPC also made some comments in relation to particular aspects of the proposed regime. In relation to proposed section 3ZQM (the power to request information or documents about 'terrorist acts' from aircraft or ship operators), the OPC expressed the following concerns:

> …there is the potential for a large quantity of information to be collected from aircraft operators and operators of cruise liners. As a result, the personal information of large numbers of individuals who are not the subject of investigations and about whom there is no cause for suspicion, could be collected. Such an outcome sits uncomfortably with the notion of necessary collection. It would be preferable for there to be greater explanation as to how such routine surveillance would be useful, including whether it is a necessary and proportional response to the need for greater security.[76]

6.101 Proposed section 3ZQM does not address the question of how long personal information, once collected, may be retained. Accordingly:

> …an approach which is consistent with best privacy practice would be to destroy the information once it is no longer necessary for the purpose for which it was collected, particularly in relation to the information of people who may not be the subject of interest to law enforcement authorities.[77]

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74 *Submission 276*, p. 6.

75 *Submission 276*, p. 7.

76 *Submission 276*, p. 7.

77 *Submission 276*, p. 7.

6.102 The OPC also commented on the breadth of proposed section 3ZQN (the power to obtain documents relating to 'serious terrorism offences'):

> This would seem to create a power for the AFP to demand personal information without judicial warrant that is considerably wider than the power which currently exists. This section appears to substitute the use of notices in place of obtaining warrants. It is the Office's understanding that only the latter are subject to judicial oversight. The need for this additional power without judicial oversight is not readily apparent.[78]

Impact on journalists

6.103 In relation to Schedule 6 of the Bill, the Explanatory Memorandum states that:

> Care has been taken to ensure sensitive material can not be obtained under the new notice to produce regime. Sensitive material held by health professionals, lawyers, counsellors and journalists is clearly not caught by the regime. Such sensitive material might be able to be obtained for the purposes of an investigation through a search warrant.[79]

6.104 Notwithstanding this, the committee received a considerable amount of evidence from journalists who raised concerns about the possible impact of proposed sections 3ZQN and 3ZQO on their ability to carry out their functions. In particular, they were concerned that the proposed regime would effectively compel them to reveal the identity of confidential sources.

6.105 For example, in its submission, Fairfax argued that:

> The Bill…in effect mak(es) journalists an investigatory arm of the state, by empowering the AFP to apply for an order requiring any person to produce documents which may help the investigation of a serious non-terrorist offence [3ZQO]. How such a provision came to be included in the Anti-Terrorism Bill 2005 is unclear.[80]

6.106 Fairfax acknowledged the Explanatory Memorandum's reference to sensitive material held by journalists not being caught by the operation of the proposed notice to produce regime. However, in its view, 'the assurances in the E[xplanatory] M[emorandum] are hollow' since the Bill itself does not contain any such assurances.[81] Fairfax expressed grave concerns that, under the Bill, 'a journalist cannot refuse to produce a document which is protected by legal professional privilege or any other duty of confidentiality, including the duty owed to a confidential source'.[82]

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78 *Submission 276*, p. 8.

79 p. 84.

80 *Submission 88*, p. 4.

81 *Submission 88*, p. 4.

82 *Submission 88*, p. 4.

6.107 The Media, Entertainment and Arts Alliance agreed that '(i)t may have been the intention that journalists not be captured in the new notice to produce regime but that intention is not reflected in the Bill itself'.[83] The ABC was also not convinced that the Explanatory Memorandum alone would provide journalists with adequate protection:

> …the Australian Federal Police can…apply for an order to produce documents which may assist the investigation of a serious (non-terrorist) offence. It is difficult to understand why such a provision in relation to non-terrorist offences should be incorporated into anti-terrorism legislation. It is noted that section 3ZQP sets out the type of material that may be subject to a Notice to Produce under section 3ZQN and 3ZQO and that the Explanatory Memorandum to the Bill confidently asserts that material held by journalists would not be caught by these provisions. However, this seems far from certain. It is quite conceivable that a journalist may come into possession of material that relates, for example, to a person's financial transactions, travel or telephone accounts and communications. If so, they would not, apparently, be immune from a Notice to Produce.[84]

6.108 The ABC also noted that, under the Bill, it is a criminal offence, punishable by imprisonment for 2 years, to disclose the fact that the ABC or one of its personnel has been given a notice to produce:

> Again, this seems to be an unreasonable and unnecessary restraint on the media's ability to provide news and information in respect of criminal activities and, specifically, terrorism.[85]

6.109 The Australian Press Council (APC) submitted that:

> The Council notes with concern some elements of the proposed Schedule 6, dealing with the power to obtain information and documents. In particular, the Council raises the question of the inclusion in the Bill of Section 3ZQO that deals with power to obtain documents related to serious offences. Other provisions in this section deal specifically with information and documents related to terrorist acts. Why is a section related to 'serious offences', which might adversely impact on the press when authorities seek the surrender of documents they believe to be in a journalist's possession, in a Bill purportedly dealing with terrorism? If such provisions are thought necessary, they should be introduced separately.[86]

6.110 In relation to the provisions dealing with serious (non-terrorist) offences, the Special Broadcasting Service (SBS) objected strongly to their inclusion in the Bill and argued that they should be removed and dealt with more appropriately in a different context:

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83 *Submission 198*, p. 4.

84 *Submission 196*, p. 3.

85 *Submission 196*, p. 3.

86 *Submission 143*, p. 4.

> The Bill also provides that the AFP can apply to a Federal Magistrate for an order to produce documents that will assist in the investigation of a "serious offence", that is, separate to the provisions relating to a "serious terrorist offence". This provision is also a matter of serious concern: it appears to go beyond the objects of the Bill and, its potential impact on the independence of journalists goes well beyond any justifiable public interest.[87]

6.111 Free TV Australia's submission expressed its view as follows:

> The extension of the AFP's power to obtain documents that may help the investigation of a serious non-terrorist offence is of serious concern to Free TV. Clearly such a provision has no place in Anti-Terrorism legislation. Of similar concern is the AFP's power to require any person to produce documents based on the suspicion that they may assist in the investigation of a terrorist offence.[88]

6.112 Moreover, Free TV Australia argued that:

> Unlike the corresponding provision in the ASIO Act where the power of the Director[-]General of Security to seek a warrant requiring a person to produce records or things which are or may be relevant to intelligence that is important in relation to a terrorism offence is subject to qualification, the proposed Bill does not require the notice to produce documents to be approved by any judicial or other supervising body. Of particular concern is the absence of protection on the basis of legal professional privilege or other duty of confidentiality. Free TV seeks the removal of the AFP's power in relation to non-terrorist offences. In relation to terrorist offences Free TV requests that the Bill be amended to require approval of a notice to produce by a judicial or such body. Further, a carve out for documents protected by legal professional privilege or any other duty of confidentiality should be included.[89]

6.113 In evidence, Professor Kenneth McKinnon from the APC contended that proposed section 3ZQO of the Bill is of particular concern to journalists:

> …clause 3ZQO of the bill…is…very threatening in that it will allow an AFP person to go into any office and seize any document in pursuit of an undefined serious crime. I go around the country and speak to editors every year. I already have examples of state police coming into an editor's room and saying, 'We want that document and we advise you not to publish.' The editors do not know what to do. They usually say, 'If you bring a warrant,' and so on. The threatening tenor, supported by a clause of this kind, would be magnified very considerably.[90]

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87 *Submission 164*, p. 2.

88 *Submission 149*, p. 3.

89 *Submission 149*, p. 3.

90 *Committee Hansard*, 17 November 2005, p. 7.

6.114 Professor McKinnon argued that specific protections should be included in legislation to enable journalists to fulfil their ultimate responsibility of keeping the public properly informed:

> We believe that there ought to be a general set of shield clauses for reporting to the public what is going on, not only about terrorism but also about every other matter, and that in the Evidence Act there ought to be a bar on a judge approving counsel requiring a journalist to divulge sources. These clauses in this legislation add to a general tenor of concern about getting at the intermediaries to the public being informed. We really want to diminish those possibilities as far as possible so that there is the least possible impediment to full reporting to the public. We do not push it as freedom for newspapers or freedom for journalists; we push it as the public's right to know.[91]

6.115 SBS agreed that Schedule 6, as currently drafted, 'does not adequately address matters such as the public interest, legal professional privilege and duty of confidence'. It argued further that:

> Any provision relating to the production of documents in relation to terrorist offences should require judicial approval and an exemption for documents protected by legal professional privilege or any other duty of confidentiality.[92]

6.116 The Media, Entertainment and Arts Alliance also contended that the Bill 'strikes at the basis of news reporting and the principles of freedom of the press'.[93] That is:

> The Alliance can see no demonstrable benefit to be gained by the provisions that will have the effect of stifling freedom of the press and infringing on freedom of political communication.[94]

Application of the regime to non-terrorism offences

6.117 As indicated in the previous section, the committee received a considerable amount of evidence objecting to the application of the notice to produce regime to serious (non-terrorism) offences (proposed section 3ZQO). Some of these concerns are outlined more fully below.

6.118 The Gilbert and Tobin Centre of Public Law argued that inclusion of serious crimes in the regime is inappropriate and unjustified:

> We object to the inclusion of this power in anti-terrorism legislation. The measures in the Bill have been publicly justified as an exceptional response

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91 *Committee Hansard*, 17 November 2005, p. 7.

92 *Submission 164*, p. 2.

93 *Submission 198*, p. 4.

94 *Submission 198*, p. 4.

> to the extraordinary threat of terrorism. Extending special terrorism powers to investigate ordinary crime exploits the anti-terrorism justification for the Bill to significantly undermine regular criminal procedure. Exceptional threats are being manipulated to justify measures which would normally be considered an impermissible intrusion on privacy and liberty.[95]

6.119 In evidence, Dr Ben Saul from the Gilbert and Tobin Centre of Public Law again emphasised this point:

> Our concern with notices to produce is…that, although this bill is publicly justified by the government as a counter-terrorism measure, notices to produce may be available to combat other serious crimes. We think it is inappropriate for that kind of modification of regular criminal investigative procedure to take place on the back of a terrorism bill.[96]

6.120 The APF were extremely critical of the application of the regime to non-terrorism offences:

> Why is the government dealing with this in the context of the rushing-through anti-terrorism legislation instead of in its hopefully considered response to the Privacy Act reviews? This is an example of 'a power grab by stealth' i.e. slipping provisions into legislation that go well beyond the apparent objective of that legislation, to prevent separate debate about those provisions in the proper context. This smacks of rank opportunism –- and should be strongly resisted.[97]

6.121 PIAC agreed:

> Given the urgency with which the Parliament is being required to consider extensive changes to the law to provide, on the Government's rationale, necessary powers to counter the terrorism threat, it is not appropriate to include other amendments to the *Crimes Act 1914* (Cth), which should be properly scrutinised by Parliament for their general affect on the operation of criminal law in Australia and the proper protections to be afforded to individuals in the criminal process.[98]

6.122 The OPC made similar observations:

> Discussion around the Bill has…focused on the extent to which the new powers are necessary and proportional as measures to combat the risks posed by terrorism. The introduction of measures that expand the powers of law enforcement agencies to investigate other offences seems to fall outside

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95 *Submission 80*, pp 15-16.

96 *Committee Hansard*, 14 November 2005, p. 65.

97 *Submission 165*, p. 5. Notices to produce were discussed in the privacy context in the Legal and Constitutional References Committee's recent inquiry into the Privacy Act: Senate Legal and Constitutional References Committee, *The real Big Brother: Inquiry into the Privacy Act 1988*, June 2005, pp 133-134 and p. 161.

98 *Submission 142*, p. 37.

> of the stated purpose of the Bill. Such measures are likely to have policy objectives distinct from those that underpin the main provisions of the Bill relating to terrorist activity and should be able to be separately scrutinised and pursued through stand-alone legislation.[99]

6.123 In a detailed submission on Schedule 6 of the Bill, Mr Kenneth Kuhlmann queried the extension of the proposed notice to produce regime to non-terrorism offences:

> The government policy objectives and the need for this particular extension of police powers is not addressed in the Bill's Explanatory Memorandum (EM). In this area one could read the EM as being disingenuous and less than informative on the effects of this provision…
>
> To my knowledge no Minister of the Government has raised this matter in public discourse and the need to apply these far reaching powers to law enforcement generally has not been the subject of public debate…[100]

6.124 Mr Kuhlmann also made a noteworthy observation:

> It is reasonable to assume that public attention to the detail of this Bill has been directed to the substantial terrorism provisions and that the single section to which I refer has simply passed unnoticed. It is also fair to say that the community generally is completely uninformed about this proposed section and its possible consequences.[101]

6.125 Moreover, Mr Kuhlmann pointed out that a significant feature of the Bill is the power to order production of documents or information kept in electronic form. He argued that the ultimate effect of the notice to produce regime in this context may be 'the establishment of secret systems of monitoring or ongoing surveillance of individuals'.[102] While this might 'be considered necessary to deal with an immediate terrorist threat', it remains to be seen 'whether such powers should be in place for all serious offences'.[103] Arguably this 'is a matter which deserves full disclosure to the Australian community in preparation for serious and measured consideration', particularly in light of the fact that 'there is no sunset provision in relation to these powers; no judicial review; and no mechanism for Parliamentary oversight'.[104]

6.126 The Federation of Community Legal Centres (Vic) expressed concern that the disclosure offences under proposed section 3ZQT apply equally to notices to produce for terrorism-related offences and for notices to produce relevant to the investigation of a serious offence:

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99 *Submission 276*, p. 8.

100 *Submission 238*, p. 1.

101 *Submission 238*, p. 1.

102 *Submission 238*, p. 5.

103 *Submission 238*, p. 5.

104 *Submission 238*, p. 5.

> The justification for secrecy provisions and disclosure offences has consistently been stated to be to protect sensitive information relating to matters of national security. It is therefore unjustifiable that a disclosure offence pertains to a serious offences notice to produce.[105]

6.127 The NSW Council for Civil Liberties concurred with these views, and pointed out that the effect of the extension of the power to serious offences is even more pronounced because the relevant provisions are not subject to a sunset clause:

> These non-terrorism powers will remain in force for more than ten years. If the information and documents [are] sought from the person under suspicion, then any material produced should not be admissible in a court of law. Otherwise, the right to silence would be undermined.[106]

6.128 PIAC pointed out that, since the power to obtain documents relevant to the investigation of a serious offence is to be issued by a Federal Magistrate on the evidence in his or her personal capacity (as opposed to 'as a court or a member of a court'), issues of constitutionality may also be raised.[107]

Justification of the proposed powers

6.129 The Department and the AFP provided the committee with arguments in support of the proposed measures in Schedule 6.[108] A representative from the Department characterised the notice to produce regime in the following way:

> The power to obtain information and documents where they are related to a terrorism offence is properly characterised as an emergency type power because it is about a terrorism offence. However, this second leg, which is about obtaining documents in relation to serious offences, is less of an emergency power. In fact, it has a magistrate authorising the issue of this notice, so it is more of a general criminal justice type aid.[109]

6.130 With respect to the extension of the notice to produce regime to serious offences, he stated that:

> I guess there is a connection in the sense that some of the serious offences in here can be mixed up with some of the terrorism offences. However, to answer the question very honestly, the emergency power component really is about the terrorism offences rather than these offences. These powers are more about enabling the people who have these documents to have some sort of reasonably accessible legal authority to hand the documents over to

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105 *Submission 167*, p. 39.

106 *Submission 161*, p. 18.

107 See further, *Submission 142*, p. 37. See Chapter 2 of this report for a discussion of general constitutional issues raised in the context of the Bill.

108 Answers to relevant questions on notice put by the committee to the AFP and the Department are at Appendix 4 and Appendix 6 respectively.

109 *Committee Hansard*, 18 November 2005, p. 42.

> the police. The documents cannot be used against the person who hands them over, so you could not use these powers effectively to target someone who had the documents. You would have to get a search warrant in that case. There is no way that you would be able to use this for all the sensitive stuff that you would think of—medical records and stuff like that. This is a limited class.[110]

6.131 A representative from the AFP presented its view that the proposed notice to produce regime is a necessary tool to assist in enhancing its operational capacity to combat terrorism:

> With regard to notices to produce, the AFP believes that notices to produce are necessary to facilitate essential and basic inquiries related to the investigation of a terrorist and other serious offences, such as confirming the existence of an account; account holder details, including residential address; account history; and payment details. The British police have such a power, which was invaluable during the response to the London bombings to identify the suspected terrorists and verify their movements and associations at a very early and critical stage. In the past the AFP would have benefited from having these powers, in particular in relation to identifying potential terrorists travelling to Australia. The AFP believes that a notice to produce power is necessary to provide enough certainty to the private sector to assist the AFP in all circumstances.[111]

6.132 The representative continued:

> Some organisations have been reluctant, or have refused, to provide information requested by the AFP under the national privacy principle No. 2. A notice to produce would alleviate these problems. As the existing alternative is seeking search warrants to access information that firms are able to disclose under the NPPs, the national privacy principles, during a terrorist event there could be insufficient evidence on which to ground such a warrant.[112]

6.133 In response to questioning by the committee with respect to extension of the notice to produce regime to serious (non-terrorism) offences, the representative of the AFP provided the following explanation:

> It is an issue for us that has been on the agenda for quite some period of time. We have been in regular discussions with the Attorney-General's Department. But what we are progressively seeing, as I think I indicated in my opening remarks, is that, particularly in the corporate sector, where information is available and able to be released, there are businesses and entities that are unsure of their legal standing. We are finding more and

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110 *Committee Hansard*, 18 November 2005, p. 43.

111 *Committee Hansard*, 17 November 2005, p. 55.

112 *Committee Hansard*, 17 November 2005, p. 55. See also Senate Legal and Constitutional References Committee, *The real Big Brother: Inquiry into the Privacy Act 1988*, June 2005, pp 133-134 and p. 161.

> more reluctance to release information to the AFP, which can be legitimately released in these instances. We are also finding that businesses, companies and corporations are effectively looking for some legal cover, some legal protection, for abiding by the relevant privacy principles. So we are seeing more and more a need for such a notice to produce.[113]

6.134 Further:

> Might I say that notices to produce are not new. The committee may well recall the Proceeds of Crime Act, where there are notices to produce in such activity. And, of course, a range of other agencies, both state and federal, have notices to produce, to facilitate their investigational activity. So, particularly when the issue of notices to produce was being actively put forward as something that was required in the terrorist context, it made absolute sense to the AFP and the department that this particular bill was the appropriate forum in which to move those forward.[114]

6.135 The representatives reminded the committee that, where the notice to produce relates to a serious (non-terrorism) offence, a Federal Magistrate must issue the notice. Moreover, 'the evidence would need to be sworn'.[115]

6.136 The representatives also emphasised that the process of obtaining a search warrant is often not appropriate, nor practicable:

> Often in the early stages of investigation there is physically not enough information to ground a search warrant. Often you find yourself—if I can put it in the colloquial—in a chicken and egg situation. You need to find some base information and look at that information, which then might be the basis on which you could ground further warrants or investigative processes.[116]

6.137 The Commonwealth Ombudsman and the Inspector-General of Intelligence and Security were not entirely satisfied with the AFP's central justification for the application of the notice to produce scheme to serious offences. While maintaining that they were 'not in a position to question the need for notices to produce in relation to terrorism offences', they suggested that 'further consideration be given to allowing this capacity – as currently drafted – to be used in relation to other serious offences as proposed in s 3ZQO'.[117]

6.138 The Commonwealth Ombudsman and the Inspector-General of Intelligence and Security argued that fishing expeditions were still possible under proposed section 3ZQO:

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113 *Committee Hansard*, 17 November 2005, p. 65.

114 *Committee Hansard*, 17 November 2005, p. 65.

115 *Committee Hansard*, 17 November 2005, p. 65.

116 *Committee Hansard*, 17 November 2005, p. 65.

117 *Submission 163A*, p. 5.

> The justification given by the Deputy Commissioner suggests that in many instances it would be sufficient for a notice to seek "information" rather than a "document" or "documents". The latter are likely to contain some extraneous and possibly sensitive information. While the proposed s 3ZQP attempts to narrow the types of documents which can be sought (but in the case of at least proposed (i) and (k), not successfully in our view), there is still the potential to encourage "fishing" or "trawling".[118]

6.139 The Commonwealth Ombudsman and the Inspector-General of Intelligence and Security pointed out that proposed section 3ZQM allows an authorised AFP officer to obtain either 'information' or 'documents' from the operator of an aircraft or ship, but proposed section 3ZQO refers only to 'documents'.[119] They suggested amendments to Schedule 6 in the following terms:

- proposed section 3ZQO (and perhaps proposed section 3ZQN) should include the capacity for a notice to require the production of either information or of documents;
- proposed subsection 3ZQO(2) should specifically require the Federal Magistrate to include in his or her considerations whether:
  - it is appropriate that the notice require the production of 'documents' rather than 'information'; and
  - in cases where documents are sought, whether the source and documents nominated are the most appropriate ones for obtaining the information of relevance to the investigation.[120]

Power to obtain information and documents – the committee's view

6.140 The committee acknowledges the significant level of concern raised throughout the course of its inquiry in respect of Schedule 6 of the Bill. However, again, the committee recognises the operational objectives behind the Bill and expresses strong support for the provision of extraordinary powers to help combat an extraordinary threat. Therefore, after careful consideration, the committee does not consider that the concerns raised warrant rejection or significant amendment to Schedule 6.

6.141 Nevertheless, the committee notes the evidence it received with respect to Schedule 6's abrogation of legal professional privilege and other duties of confidence, including the duty of journalists not to reveal confidential sources. The committee agrees that legal professional privilege and other duties of confidence should be preserved absolutely in respect of any documents or information sought under the notice to produce regime in Schedule 6. This aligns with the committee's view in

118 *Submission 163A*, p. 5.

119 *Submission 163A*, p. 6.

120 *Submission 163A*, p. 6.

relation to legal professional privilege in the context of the preventative detention regime.[121]

6.142 The committee also agrees with the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security's suggested amendments to proposed section 3ZQO which would limit the scope of the notice to produce regime for serious (non-terrorism) offences in order to protect the capture of extraneous and possibly sensitive information.

6.143 Further, the committee acknowledges, and agrees with, comments and suggestions by the OPC in relation to the expansion of the powers of law enforcement agencies to collect and use personal information under Schedule 6. The committee notes that similar arguments could also apply to Schedule 5 and Schedule 8 (enabling the Minister to determine a code regulating and authorising the use of optical surveillance devices at airports and on board aircraft by aviation industry participants) of the Bill. Specifically, the committee is mindful that these powers provide a significant degree of unilateral authority in law enforcement officers (and others), with no corresponding statutory guidance as to how such authority should be exercised. The committee agrees that such broad powers should be accompanied by some guidance as to how they should be executed and recommends that best practice procedures be developed in this regard.

6.144 The committee is also of the view that the Bill be amended to include a sunset clause of five years applicable to Schedule 6, in light of the stated purpose of the Bill as a specific and exceptional response to the threat of terrorism.

Recommendation 40

6.145 The committee recommends that proposed section 3ZQR of Schedule 6 of the Bill be amended to preserve absolutely legal professional privilege and other duties of confidence, including the duty of journalists not to reveal their sources, in respect of any documents or information sought under the notice to produce regime in Schedule 6.

Recommendation 41

6.146 The committee recommends that proposed section 3ZQO of Schedule 6 of the Bill be amended to better protect the capture of extraneous and possibly sensitive information from the scope of the notice to produce regime for serious (non-terrorism) offences. That is:

- **proposed section 3ZQO be amended to include the capacity for a notice to require the production of either 'information' or of 'documents';**
- **proposed subsection 3ZQO(2) be amended to specifically require Federal Magistrates to consider also whether:**

121 See Chapter 3 of this report.

- **it is appropriate that the notice require the production of 'documents' rather than 'information'; and**
- **in cases where documents are sought, whether the source and documents nominated are the most appropriate ones for obtaining the information of relevance to the investigation.**

Recommendation 42

6.147 The committee recommends that a set of best practice procedures and guidelines be developed in consultation with the Office of the Privacy Commissioner to govern the collection, use, handling, retention and disposal of personal information acquired under the powers in Schedules 5, 6 and 8 of the Bill.

Recommendation 43

6.148 The committee recommends that the Bill be amended to include a sunset clause of five years applicable to Schedule 6.

Recommendation 44

6.149 The committee recommends that the Bill be amended by inserting an express requirement for a public and independent five year review of the operation of Schedule 6.

ASIO powers - outline of key provisions

6.150 Schedule 10 of the Bill amends the *Australian Security Intelligence Organisation Act 1979* (ASIO Act), the *Customs Act 1901* (Customs Act), the *Customs Administration Act 1985* (Customs Administration Act), and the *Migration Act 1958* (Migration Act).

6.151 Schedule 10 amends the ASIO Act to:

- expand the scope of ASIO's special powers warrant regime by:
  - clarifying the scope of computer access warrants to include a 'data storage device' (such as a compact disc) to allow ASIO to conduct lawful operations in the face of changing technologies, and to resolve any possible ambiguities in relation to what constitutes electronic equipment (Item 1);
  - extending the time period for the validity of search warrants (from 28 days to 90 days) (Item 12) and inspection of postal and delivery service warrants (from 90 days to 6 months) (Items 16 and 17), and extending the maximum time periods for foreign intelligence gathering warrants so that these periods are consistent with the general warrant time periods (Items 18-20);

  - allowing for the removal and retention of material found during the execution of a search warrant for 'such time as is reasonable' unless its return would be 'prejudicial to security' (Items 23 and 24); and
  - extending computer access warrants to allow entry onto premises without the need for a separate (search) warrant to authorise such entry (Item 13);
- provide ASIO with the power to request assistance from operators of aircraft and vessels, and impose obligations on such operators to answer questions and produce information and documents (in relation to the aircraft or vessel, or its cargo, crew, passengers, stores or voyage) that are in the possession or under the control of the operator (Item 2);
- align the offence of providing false or misleading information during questioning under a warrant issued under Division 3 of Part III of the ASIO Act (to covertly collect intelligence information that 'is important in relation to national security') with the formulation used in similar offences in the Criminal Code (Items 21 and 22); and
- make it clear that obligations, prohibitions and restrictions imposed by control orders under proposed Division 104 of the Criminal Code will not be a 'prescribed administrative action' for the purposes of Part IV of the ASIO Act (Items 26-28).

6.152 Schedule 10 also amends the Customs Act and the Customs Administration Act to broaden the powers of Customs officers to copy documents in relation to 'security or intelligence' matters (where the documents are relevant to specific functions of ASIO); and to allow Customs officers to lawfully disclose information relevant to 'security or intelligence' to relevant agencies (Items 29 and 30). It also amends the Migration Act to clarify the power to deport non-citizens on security grounds so that the definition of 'security' is the same as the definition in the ASIO Act (Items 31 and 32).

ASIO powers – key issues

6.153 The key concerns raised in submissions in relation to Schedule 10 of the Bill include:

- the necessity of the new ASIO powers;
- the proposed extension of time periods for validity of ASIO search warrants.; and
- the proposed ASIO power to confiscate seized items.

Need for the new powers

6.154 Most submissions commenting on Schedule 10 questioned the need and justification for the new powers, given the existence of ASIO's already extensive powers (most of which, to date, have not been utilised). Some submissions also

queried the inclusion of expanded ASIO powers in the Bill before the completion of various reviews of Australia's current anti-terrorism laws (which, it was contended, may effectively render these reviews meaningless).[122]

6.155 For example, the Federation of Community Legal Centres (Vic) submitted that:

> …we reiterate our concern relating to the necessity of extending ASIO's powers…ASIO have expressly stated in public hearings that they do not require an extension of their powers and no circumstances have been elucidated to justify this proposed extension of their powers. Furthermore, the review of ASIO's existing 'special powers' with respect to terrorism offences is incomplete. Again, we submit that it is imprudent to be affording ASIO an extension of their powers while the review of their existing powers remains incomplete.[123]

6.156 The Australian Privacy Foundation (APF) raised similar concerns:

> The changes to ASIO powers contained in Schedule 10 are not adequately justified (other than some technical changes which seem unobjectionable). We understand that the former Director-General of ASIO – Mr Richardson – stated publicly earlier this year that he considered ASIO's powers to be adequate and that he was not seeking further powers. The government has produced no explanation for why this assessment is no longer valid.[124]

6.157 In particular, the APF noted concerns relating to changes to the warrant regime and noted that '(t)he last round of amendments to the ASIO warrant regime benefited greatly from a lengthy period of Senate Committee scrutiny'.[125] The APF also submitted that the extension of the power of ASIO to require information from operators of aircraft and ships is not adequately justified:

> …there is inadequate explanation of the extent of the changes, and the justification for them, to allow for us to make a judgement as to their proportionality. But clearly any extension of compulsory information gathering powers outside of a judicial warrant regime are a matter of concern and need to be examined carefully.[126]

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122 See, for example, Mr Joo-Cheong Tham and others, *Submission 81*, pp 13-14; Federation of Community Legal Centres (Vic), *Submission 167*, p. 48; Mr Alan Behm, *Submission 193*, p. 8; AMCRAN, *Submission 157*, p. 30; Ms Catharine Errey, *Submission 257*, p. 1. Current reviews of anti-terrorism laws, as referred to elsewhere in this report, include the review by the Parliamentary Joint Committee on ASIO, ASIS and DSD; and the review being undertaken by the independent Security Legislation Review Committee, announced by the Attorney-General in October 2005.

123 *Submission 167*, p. 44.

124 *Submission 165*, p. 7.

125 *Submission 165*, p. 7.

126 *Submission 165*, p. 7.

6.158 The Federation of Community Legal Centres (Vic) also warned that any expansion of ASIO's powers should be considered against the non-transparent nature of its operations:

> The Federation is generally concerned with any extension to ASIO's powers. Being the agency responsible for intelligence gathering, ASIO necessarily operates covertly and is therefore not subject to the same public scrutiny as other agencies. Given that ASIO does not operate transparently (by necessity) it is not as easily made accountable. Any extension of its powers must therefore be approached with extreme caution. We submit that in the absence of compelling justifications for these extensions, the powers of ASIO should remain at the minimum required for them to properly fulfil their role. In this instance, no justifications have been provided for these extensions. It is therefore our submission that, even if other parts of the Bill are passed, this particular Schedule should not proceed.[127]

6.159 The OPC made some general observations about the proposed new ASIO powers. While noting that the activities of ASIO do not fall within the jurisdiction of the Privacy Act, the OPC still recommended that 'any expansion in its powers in relation to the collection, use and handling of personal information should be accompanied by strong guidance in relation to best practice in the handling and disposal of that information'.[128]

6.160 Specifically, the OPC highlighted Item 2 of Schedule 10 which grants ASIO additional powers to collect personal information from the operators of ships and aircraft and introduces an offence for not producing such documents:

> In many cases, the exercise of this power could result in the collection of personal information about individuals who are not the subject of inquiry and about whom there is no cause for suspicion.
>
> The O[PC] notes that there is no guidance on the grounds on which the Director-General, or senior officer authorised in writing, may authorise an ASIO officer to exercise this power (see, new section 23(6) [of the ASIO Act]).[129]

6.161 The OPC suggested that guidance from the Inspector-General of Intelligence and Security would be beneficial 'in relation to the collection, use and disposal of records by ASIO, particularly those relating to individuals not the subject of interest to ASIO'.[130]

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127 *Submission 167*, p. 46.

128 *Submission 276*, p. 13.

129 *Submission 276*, p. 13.

130 *Submission 276*, p. 13.

Extension of time periods for search warrants

6.162 Some submissions argued that there is no apparent justification for the proposed extension of time periods for ASIO search warrants.

6.163 For example, in their submission, Mr Joo-Cheong Tham and others argued that:

> At present, it is possible for ASIO to seek the issue of a further warrant if there continue to be grounds for the issuing of a warrant. The proposed amendment is therefore unnecessary for ASIO to be able to carry out its operations. Rather, it would simply reduce the degree of oversight to which ASIO is subject. In particular, if the time period for which a warrant remains in force is doubled, ASIO is in effect invited to take an ever less strict view of what counts as an individual's likelihood to engage in activities prejudicial to security. With a lengthened period of surveillance, the threshold requirement that interference under the warrant would be likely to assist in obtaining intelligence is also diluted.[131]

6.164 Arguably, by extending the time periods in such a way, 'one of the key factors balancing the interests of privacy against the interests of security' is diminished significantly.[132]

6.165 PIAC commented that the current time periods for warrants provide important safeguards:

> There is no apparent or rational justification provided for such an extension. Limited time for the operation of warrants is an important safeguard against abuse of the warrant power and protects against a warrant being used as the basis of a fishing expedition where a lack of clear and relevant evidence has been obtained through targeted enquiries.[133]

6.166 PIAC also argued that it is appropriate 'to maintain the current time limits throughout, thereby requiring ASIO to seek a further warrant based on its further information gathering activities'.[134]

6.167 The Gilbert and Tobin Centre of Public Law submitted along similar lines:

> Tripling the length of ASIO search warrants from 28 days to three months (cl 27A(3)(a)), and both mail and delivery service warrants from 90 days to 6 months (cl 27(4) and 27 AA(9)) cannot be justified. Reasonably short time limits on warrants are designed to ensure that warrants are not abused

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131 *Submission 81*, p. 23; see also Mr Patrick Emerton and Mr Joo-Cheong Tham, *Submission 152*, p. 44.

132 *Submission 81*, p. 23; see also Mr Patrick Emerton and Mr Joo-Cheong Tham, *Submission 152*, p. 43.

133 *Submission 142*, p. 38.

134 *Submission 142*, p. 38.

> by the authorities to conduct fishing expeditions over extended periods, where there is insufficient evidence of specific criminal conduct. Where suspicion of criminal activity continues over a protracted period of time, a new warrant should be made on the basis of any current and accurate information which justifies the continuing need for the warrant.[135]

6.168 Importantly, and on a more general note, PIAC also pointed out that none of the provisions relating to ASIO in Schedule 10 is limited in operation to ASIO activities that are specific to a terrorism threat:

> Rather, the power extends generally and so could be applied to any ASIO investigation, where in the past the Parliament has felt that the existing time limits were an appropriate balance.[136]

Power to confiscate items

6.169 Some submissions also commented on Items 23 and 24 of Schedule 10 which propose to amend section 34N of the ASIO Act to allow ASIO to retain seized items for 'such time as is reasonable' unless its return would be 'prejudicial to security'. The term 'security' is defined very broadly in the ASIO Act to include, for example, the protection of the people of the Commonwealth and the states and territories from espionage, sabotage, and politically motivated violence.[137]

6.170 Mr Patrick Emerton and Mr Joo-Cheong Tham contended that '(t)he single most concerning part of the Bill in relation to ASIO special powers warrants…is the power it would give to ASIO to confiscate property'.[138] ASIO does not currently possess a power of confiscation. Mr Emerton and Mr Tham pointed out that '(t)he risk of abuse [of the power of confiscation] is all the greater because ASIO is able to execute its search warrants, and the power of confiscation that it would be granted, in secret'.[139]

6.171 The Federation of Community Legal Centres (Vic) argued that 'the expansive definition of 'security'…effectively allows ASIO to confiscate items in an incredibly broad range of circumstances'.[140] Since ASIO is 'inherently a covert organisation that is not subject to the same mechanisms for oversight as law enforcement agencies', it is undesirable that it be given such broad powers to confiscate personal property.[141]

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135 *Submission 80*, p. 23.

136 *Submission 142*, p. 38.

137 See ASIO Act, s. 4.

138 *Submission 152*, p. 45. This may also raise an issue of constitutionality under section 51(xxxi) of the Constitution which requires the Commonwealth to acquire property only on 'just terms': see further *Submission 152*, pp 46-47.

139 *Submission 152*, p. 46.

140 *Submission 167*, p. 45.

141 *Submission 167*, p. 45.

6.172 Importantly, it was suggested that granting ASIO the power to confiscate property may also serve to compromise its role as an intelligence agency (as opposed to a law enforcement agency).[142] PIAC also made a general comment about the importance of the separation of intelligence and law enforcement powers which is relevant in this regard: namely that it is 'wary of any developments that would see the AFP transformed into an intelligence agency, or vice-versa, that is, ASIO taking on law-enforcement powers'.[143]

Justification of the proposed powers

6.173 The committee heard that ASIO supports the Bill 'as part of an evolving legislative framework directed at strengthening Australia's counter-terrorism capabilities'.[144] The Director-General of ASIO told the committee that:

> …it is essential that intelligence and law enforcement agencies have the capacity to effectively investigate potential threats and, where necessary, to intervene at an early enough stage to prevent a terrorist act from occurring.[145]

6.174 The Director-General advised the committee that, from ASIO's perspective, the proposed measures in the Bill would give ASIO 'a greater capacity to make better judgments about whether or not a threat is imminent'.[146] While '(t)he threat will not be abolished by the passage of these laws', the capabilities of the security intelligence and law enforcement agencies would be significantly enhanced.[147]

6.175 In evidence, representatives from ASIO justified the proposed extension of time limits for search warrants. The Director-General stated that:

> We have had evidence in recent times that operational considerations and operational flexibility would be considerably enhanced by having that greater period to operate in…(T)he extension of that period does not actually change the powers that ASIO has, but having a longer time frame within which to operate would be of use to us.[148]

6.176 A representative from ASIO clarified that current conditions and safeguards attaching to ASIO warrants would remain, despite the extension of time limits for their validity:

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142 Mr Joo-Cheong Tham and others, *Submission 81*, p. 25.

143 *Submission 142*, p. 24.

144 *Committee Hansard*, 17 November 2005, p. 53. Answers to questions on notice put to ASIO by the committee are at Appendix 5.

145 *Committee Hansard*, 17 November 2005, p. 53.

146 *Committee Hansard*, 17 November 2005, p. 60.

147 *Committee Hansard*, 17 November 2005, p. 60.

148 *Committee Hansard*, 17 November 2005, p. 60.

> I will just add to that that a search warrant can be executed only once, and it would still have to be the case that the grounds on which the warrant was issued—that is, that access to particular premises would yield items relevant to security—continue to exist. If during the longer period the (D)irector-(G)eneral is satisfied that the grounds no longer exist, there is a statutory obligation to take action to have the warrant discontinued. This just simply allows the situation where, for various reasons, it might not have been practical to execute the warrant within 28 days but at the end of that 28 days the grounds upon which the warrant was sought continue to apply.[149]

6.177 With respect to the new power to obtain information or documents from aircraft or vessel operators, the representatives from ASIO told the committee that currently ASIO would require the cooperation of such operators to provide the information or documents on a voluntary basis, or a search warrant. The Director-General stated that:

> At the moment, if my understanding is correct, there is no strict legal requirement for airlines to supply information of that kind to an organisation such as ASIO, although there has been cooperation with some of the airlines some of the time in obtaining information. If we have a situation where we know a person of interest is travelling, say, from Sydney to Lebanon or Afghanistan, sometimes it is possible, but it is not predictable that we will be able to obtain that information.
>
> …
>
> We would probably request the information from the airlines. We could use a search warrant.[150]

6.178 The other representative added that:

> We could theoretically request a search warrant, but we might be at a lower stage in the inquiry where the test for a search warrant might not be met or there might be a number of airlines that may have relevant information.[151]

6.179 The representatives from ASIO also provided comments on the proposed amendments to section 34N (Items 23 and 24 of Schedule 10) of the ASIO Act to allow ASIO to retain seized items for 'such time as is reasonable' unless their return would be 'prejudicial to security'. The representatives told the committee that it is not the intent of this proposed amendment to connote a position where the items are never returned:

> That is not the intent and that is not how we read it, because it is still subject to the requirement that it be returned in such time as is reasonable…unless an earlier return might be [prejudicial to security]…[152]

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149 *Committee Hansard*, 17 November 2005, p. 60.

150 *Committee Hansard*, 17 November 2005, p. 64.

151 *Committee Hansard*, 17 November 2005, p. 64.

6.180 When the committee pointed out that the Bill does not expressly contain the word 'earlier', the representative reiterated that it was the intention that it do so:

> The intention is that the items can only be withheld for a longer period than the time needed to inspect and examine if there is a security reason for holding onto them.[153]

6.181 The representative assured the committee that clarification of this part of the Bill would be pursued with the Department.[154]

6.182 In response to questioning by the committee in relation to the impact of increased ASIO powers on civil liberties, the Director-General informed the committee that ASIO is involved in a broader process that the Federal Government considers when developing legislation:

> Ultimately, that is not a judgment that we alone make. We are part of a much broader process that the federal government considers. It has people specifically mandated to give it advice on those issues. I think you had testimony from the Chairman of the Human Rights and Equal Opportunities Commission, for instance. So there are a variety of mechanisms where the government gets input into its considerations about how particular proposals might affect civil liberties. We have quite a number of in-house lawyers who advise on that issue, but there are many other people in, say, the Attorney-General's Department who advise the government on it. It has a wide range of views from outside the formal bureaucratic structures and so on.[155]

ASIO powers – the committee's view

6.183 The committee acknowledges the significant level of concern raised in submissions and evidence with respect to the Bill's proposed changes to ASIO powers. In particular, the committee notes the broad nature of the provisions extending the time periods for validity of search warrants, and their potential application to *any* ASIO investigation. The committee is of the view that the Bill should limit the extension of time periods for search warrants to ASIO investigations specifically relating to suspected terrorist activities and offences. This is particularly pertinent in light of the stated rationale of the Bill – a response to the threat of terrorism in Australia.

6.184 The committee is also mindful of apprehension expressed by some witnesses in relation to the proposed ASIO power to confiscate items, which could serve to compromise its role as an intelligence agency. In stating this, however, the committee accepts assurances from representatives of ASIO and the Department that the intent of

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152 *Committee Hansard*, 17 November 2005, p. 64.

153 *Committee Hansard*, 17 November 2005, p. 64.

154 *Committee Hansard*, 17 November 2005, p. 64.

155 *Committee Hansard*, 17 November 2005, p. 61.

the proposed amendments to section 34N of the ASIO Act (Items 23 and 24 of Schedule 10) is not to connote a position where the items are never returned, but rather to allow ASIO to retain relevant items for a longer period than currently permitted if there is a 'security' reason for doing so.[156] The committee recommends that the Bill be amended to clarify this position beyond doubt.

6.185 Further, the committee notes, and agrees with, the recommendation by the OPC that any expansion of ASIO's powers in relation to the collection, use and handling of personal information should be accompanied by strong guidance about best practice in the handling and disposal of that information. The committee agrees that guidance from the Inspector-General of Intelligence and Security would be beneficial with respect to the collection, use and disposal of records by ASIO. This is particularly pertinent in relation to information about individuals who are not the subject of interest or investigation.

6.186 The committee is also of the view that the Bill should include a sunset clause of five years which is applicable to Schedule 10, in light of the stated purpose of the Bill as a specific and exceptional response to the threat of terrorism.

Recommendation 45

6.187 The committee recommends that Items 12 and 16-20 of Schedule 10 of the Bill be amended to limit the provisions extending the time periods for validity of search warrants to ASIO investigations specifically relating to suspected terrorist activities and terrorism offences only.

Recommendation 46

6.188 The committee recommends that Items 23 and 24 of Schedule 10 of the Bill be amended to clarify that the power allowing for the removal and retention of material found during the execution of an ASIO search warrant, for 'such time as is reasonable' unless its return would be 'prejudicial to security', does not encompass a power to confiscate the material absolutely.

Recommendation 47

6.189 The committee recommends that ASIO, in consultation with the Inspector-General of Intelligence and Security, develop a set of best practice procedures and guidelines to govern the collection, use, handling, retention and disposal of personal information acquired under its expanded powers in Schedule 10 of the Bill.

Recommendation 48

6.190 The committee recommends that the Bill be amended to include a sunset clause of five years applicable to Schedule 10.

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156 See also answers to questions on notice at Appendix 5.

Recommendation 49

6.191 The committee recommends that the Bill be amended by inserting an express requirement for a public and independent five year review of the operation of Schedule 10.

CHAPTER 7

ANTI-MONEY LAUNDERING AND TERRORISM FINANCING

Introduction

7.1 This chapter will outline the key provisions and issues raised in relation to the following aspects of the Bill:

- the proposed amendments to the *Financial Transaction Reports Act 1988* (the FTR Act) and other related legislation (Schedule 9); and
- the proposed amendments to expand existing terrorism financing offences (Schedule 3).

New anti-money laundering provisions

7.2 Schedule 9 of the Bill amends the FTR Act, and makes consequential amendments to the *Proceeds of Crime Act 2002*, and the *Surveillance Devices Act 2004,* in order 'to better implement the requirements of the Financial Transaction Task Force' (FATF).[1]

7.3 The FATF is an international organisation concerned with strengthening anti-money laundering (AML) provisions in the global financial system, including recommending legislative and enforcement measures for individual countries to implement. To this end, it developed a series of 40 AML recommendations in 1990, which have been revised twice since. In the aftermath of the terrorist attacks on 11 September 2001, FATF also adopted 9 special recommendations on combating the financing of terrorism (CFT). The amendments contained in Schedule 9 of the Bill address three of these FATF CFT special recommendations – Special Recommendation VI (remittance services), Special Recommendation VII (wire transfer funds services), and Special Recommendation IX (cash couriers).[2]

7.4 Australia's progress in meeting the various FATF recommendations was reported in a FATF country evaluation published in October 2005. Of the three special recommendations in question, Australia was rated as 'partially compliant' for special recommendations SR VI and SR IX, and 'non-compliant' with SR VII. Australia achieved a rating of 'largely compliant' to most of the other special recommendations.

7.5 Australia's principle anti-money laundering legislation - 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*.

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1 Explanatory Memorandum, p. 97.

2 Bills Digest, p. 49. The following paragraphs are drawn from pp. 49-51 of the Bills Digest.

However, following the revision of the FATF recommendations in 2003/04, the Australia Government committed itself to a further overhaul of the FTR Act and associated legislation. The Bills Digest reports that the consultative process has been lengthy, with industry groups raising concerns over compliance costs and competitive neutrality between different sectors.[3] The Government is likely to release an exposure draft anti-money laundering Bill later this year. That Bill is expected to cover a broad range of FATF recommendations.[4]

Outline of the key provisions

Cash dealers and remittance services

7.6 Item 11 of Schedule 9 inserts new Part IIIB – Register of Providers of Remittance Services – into the FTR Act.[5] Proposed section 24E provides that cash dealers (other than financial institutions and real estate agents) who provide remittance services must provide certain information to the Director of the Australian Transaction Reports and Analysis Centre (AUSTRAC). AUSTRAC is the Commonwealth agency with primary responsibility for day to day administration of the FTR Act.

7.7 A failure to provide the above information carries a maximum penalty of 2 years imprisonment, or in the case of a corporation, a fine of approximately $50,000.

7.8 The detail of the information the cash dealer must provide to AUSTRAC will be prescribed by regulations. The Explanatory Memorandum to the Bill notes this is likely to include Australian Business Numbers and various contact details. The information provided will be placed on a Register maintained by the Director.[6]

International funds transfer

7.9 Item 10 of Schedule 9 inserts new Division 3A into Part II of the FTR Act.[7]

7.10 In order to strengthen the existing reporting and recording-keeping obligations contained in Part II of the FTR Act, new Division 3A will require customer information to be included in instructions for international funds transfers into and out of Australia. In particular, proposed section 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 ordering customer. In relation to funds transfers coming into Australia, clause 17FB in certain situations allows the

3 Bills Digest, p. 49.

4 Senator the Hon Chris Ellison, Minister for Justice and Customs, Australia Fighting Money Laundering and Terrorism Financing, media release, 17 October 2005.

5 The following paragraphs are drawn from the Bills Digest, pp 49-50.

6 See proposed section 24F of the Bill.

7 Bills Digest, p. 50.

AUSTRAC Director to direct a cash dealer to request the ordering customer to include customer information in all future incoming transfers.

7.11 The customer information required includes the customer's name, residential or business address, account number or identification code. Additional information such as the customer's date and place of birth may be required in respect of funds transfers coming into Australia.[8]

7.12 A failure to comply with the above requirements carries a maximum penalty of 2 years imprisonment, or in the case of corporation, a fine of approximately $50,000.[9]

Cash couriers - bearer negotiable instruments taken in and out of Australia

7.13 Schedule 9 of the Bill also inserts into the FTR Act new reporting requirements in respect of 'bearer negotiable instruments'. These amendments address the FATF's comments in its country evaluation report for Australia that:

> … [while] Australia has a comprehensive system for reporting cross-border movements of currency above AUD 10,000 to AUSTRAC … there is no corresponding system for declaration/disclosure of bearer negotiable instruments.[10]

7.14 For the purposes of the Bill, 'bearer negotiable instruments' are defined to include bills of exchange, cheques, money orders, postal orders, travellers' cheques, and promissory notes. That is, the types of instrument whereby the holder, or some other person, can exchange for cash or a deposit of equivalent value in a bank account.[11]

7.15 Item 18 of Schedule 9 inserts proposed section 33AA into Part V of the FTR Act. It provides that a person that is leaving or arriving in Australia must, if requested by an officer, declare any bearer negotiable instruments they have with them and the amount payable under each instrument. They must also produce each instrument to the officer, if requested. If a person fails to declare or produce a bearer negotiable instrument 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 they have 'reasonable grounds to suspect that the person has made a false or misleading declaration' in response, they may search their baggage or person. Officers may seize any bearer negotiable instruments in respect of which a false declaration has been made.[12]

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8 See subsection 17FA(3) and subsection 17FB(6) of the Bill.

9 Bills Digest, p. 50.

10 FATF, *Third Mutual Evaluation Report on Money Laundering and Combating of the Financing of Terrorism – Australia*, 14 October 2005 at p.18, cited in Bills Digest, p. 50.

11 See Item 1 of Schedule 9.

12 Bills Digest, p. 50.

7.16 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 listed in proposed Schedule 3AA.[13]

7.17 The Explanatory Memorandum notes that there is no monetary limit on the face value of a bearer negotiable instrument that triggers the above reporting requirements. It explains that:

> In practice a person will only be required to produce a bearer negotiable instrument when asked by an officer. It is not proposed that the currency declaration system that applies to all persons travelling into or out of Australia be extended to bearer negotiable instruments. This 'disclosure when asked' system will enable more targeted use of customs and police resources.[14]

Commencement of the above provisions

7.18 The Bill provides that the proposed amendments concerning international fund transfer instructions and registration of remittance service providers shall commence on Proclamation, or if any of the relevant provisions do not commence within the period of 6 months beginning on the day the Act receives Royal Assent, they shall commence on the expiry of 6 months and one day from the date of Royal Assent.[15] According to the Explanatory Memorandum:

> The reason for the potential delay of 6 months for the commencement of these provisions is to allow for industry to develop processes to meet the inclusion of customer information requirements with international funds transfer instructions and for AUSTRAC to implement appropriate systems to raise public awareness of the new register requirements and to manage this information.[16]

7.19 The Bill provides that the amendments concerning negotiable bearer instruments generally commence on Proclamation, or if any of the relevant provisions do not commence within the period of 12 months beginning on the day the Act receives Royal Assent, they commence on the expiry of 12 months and one day from the date of Royal Assent.[17] According to the Explanatory Memorandum:

> The reason for the potential delay of 12 months for the commencement of these provisions is to allow for a public education campaign to raise

13 See Item 21 of Schedule 9 of the Bill; Bills Digest, p. 50.

14 p 99.

15 See clause 2 of the Bill.

16 p. 4.

17 Clause 2 of the Bill.

> awareness about the implications of the amendments and to enable the AUSTRAC to put in place appropriate training and system upgrades.[18]

Issues

7.20 Key concerns raised in respect of the Schedule 9 of the Bill include the following:

- a lack of consultation with industry on the detail of the provisions;
- the Bill's interaction with the pending AML review and legislation and the potential cost to industry of having to amend their processes and systems to comply with the Bill and then the AML legislation;
- industry's need for more time in which to make the necessary changes in order to be compliant with the Bill; and
- privacy concerns over the required transfer of customer information.

Lack of consultation with industry

7.21 The Department argued that the amendments in Schedule 9 of the Bill should not take industry by surprise. It advised the committee that:

> … Industry has been closely consulted on AML/CTF reform, and the FATF Forty Recommendations and Special Recommendations on Terrorist Financing since the Government announced its intention to implement the FATF Recommendations in December 2003. Consultation has taken a number of forms, including the release of industry-specific discussion papers, several meetings of a Ministerial Advisory Group and Systems Working Group, and ongoing discussion between industry representatives and the Department. More recently a number of round-table forums were held with the financial sector, co-chaired by the Minister for Justice and Customs and the ABA [Australian Banker Association], resulting in agreement on many specific issues, including funds transfers. The proposed amendments on funds transfers are consistent with the agreements reached on this issue.[19]

7.22 The Department did acknowledge that the banking and finance industry has not been consulted on the exact provisions of the Bill.[20] As the Australian Bankers Association stated:

> It is certainly the case that we have been involved in extensive consultation with the government and we continue that in relation to the AML bill. The point at issue here, however, is the detail of some very specific provisions. That is quite a different matter to talking about principles in relation to FATF recommendations.[21]

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18 EM, p. 4

19 *Submission 290A*, Attachment B, p. 29.

20 *Submission 290A*, Attachment B, p. 29.

21 Mr Tony Burke, *Committee Hansard*, 17 November 2005, p. 15

The Bill's interaction with the pending AML review and legislation

7.23 In this regard, a key concern of the Australian Bankers Association was possible overlap with the pending AML Bill. As the Department explained:

> Similar provisions to those contained in Schedule 9 of the AT Bill will be in the AML/CTF exposure Bill, as the FTR Act will eventually be replaced by the new AML/CTF legislation.[22]

7.24 The Department confirmed that the exposure Bill will also impose additional related obligations necessary to ensure greater compliance with relevant FATF Special Recommendations.[23]

7.25 Industry representatives were therefore concerned that financial institutions were potentially faced with two different pieces of legislation and compliance obligations, which may involve the same internal systems and processes, but with different requirements and dates of effect. The Australian Bankers Association was particularly concerned to avoid:

> … an outcome where banks, and many other financial institutions, would be required, in a relatively short time frame, to undertake two major sets of changes to the same computer systems and business processes: one to meet the ATB's requirements, and the other to meet the requirements of the new anti money laundering laws, the specific requirements of which are not yet known.[24]

7.26 These concerns were shared by the Association of Superannuation Funds of Australia.[25]

Cost to industry

7.27 At issue here was the potential cost to industry. The Department's view was that Schedule 9 of the Bill would have relatively little cost impact on industry and any assessment of cost could safely be left to the consultation on the AML exposure Bill. In its view, consultation at that time 'will enable an assessment of the overall costs to industry of AML/CTF reform to occur'.[26] The Department also advised the committee that consideration of measures to alleviate or offset industry's implementation costs could be also be left to consultation on the exposure Bill.[27] The Department also noted that the amendments in Schedule 9 had been designed to have a minimal impact on

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22 *Submission 290A,* Attachment A, p. 30.

23 *Submission 290A,* Attachment B, p. 28.

24 Mr David Bell, *Committee Hansard*, 17 November 2005, p. 14.

25 *Submission 64*, p. 1.

26 *Submission 290A,* Attachment B, p. 29.

27 *Submission 290A,* Attachment B, p. 34.

business pending that further consultation, but were going to have been implemented at some stage as they are FATF requirements. [28]

7.28 Industry representatives had a less sanguine view. They argued that Schedule 9 of the Bill – particularly the amendments concerning international funds transfers - would involve 'very significant change' to industry practice and processes. Mr Bourke of the Australian Bankers Association stated:

> … what is sought of us now by these provisions is not currently provided and … to provide this information in the specific form requested will require changes to core systems and to multiple core systems, because these payments are processed across a range of applications. It is also the case that the larger institutions process payments on behalf of smaller institutions and those smaller institutions will need to provide the same information, with possibly, relative to the size of their institutions, a greater impact.[29]

7.29 These sentiments were echoed by Mr Bell, also of the Australian Bankers Association:

> There must be a cost. If you change computer systems there is a cost. If you change computer systems twice, because of overlap or underlap of legislation, there will be more cost involved. What that cost is we do not know. It is not insignificant.[30]

Additional time required to ensure compliance

7.30 Industry representatives argued that there was a need for more time and further consultation. They had originally argued for an implementation period of 3 years for the proposed AML/CTF legislation, part of which is now covered by the Bill. As explained above, the Bill provides that Schedule 9 will come into force within six months (for international fund transfer instructions and registration of remittance service providers) and 12 months (for negotiable bearer instruments) of the Bill receiving Royal Assent. Industry had expressed concern at having to ensure all relevant systems and processes are compliant by the earlier date than expected.[31]

7.31 In support of the argument for more time, industry representatives also raised a number of specific concerns with the detail and drafting of the Bill.[32]

7.32 In light of the above, the Australian Bankers Association put the following recommendation to the committee:

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28 *Submission 290A,* Attachment B, p. 33. *Submission 290A,* Attachment A, p. 29.

29 *Committee Hansard*, 17 November 2005, p. 15.

30 *Committee Hansard*, 17 November 2005, p. 16.

31 Australian Bankers Association, *Submission 26*, Attachment, p. 2.

32 Australian Bankers Association*, Submission 26*, Attachment. See also Australian Bankers Association, *Submission 26B*

> The simplest solution, which would involve minimal changes to the Bill, would be to increase the implementation time by changing the date of commencement of proposed new sections 17FA and 17FB to 'a date to be proclaimed'. The date to be proclaimed should be the same as the date of commencement of related provisions in the new anti money laundering laws currently being drafted. Proposed sections 17FA and 17FB of the bill should also be repealed in 2006, on the date of royal assent for the new anti-money laundering laws, and replaced by provisions in the anti money laundering legislation. The consultation period for the anti money laundering laws would allow industry to work with governments to overcome the problems in the current drafting of this bill.[33]

7.33 In response, the Department stressed that there was a need to act now to prevent the Australian financial system being used for terrorist financing purposes. It pointed out that, in contrast, there is likely to be a considerable period before the new AML legislation will come into force. Although this new legislation was likely to be introduced into Parliament in mid-2006, a considerable transition period would still be required to allow industry implementation of the new requirements.[34]

7.34 The Department also argued that action was required now to prevent the Australian financial system from being used to finance terrorism and to ensure that Australian financial institutions are not barred from sending funds transfers to Europe and the US.[35] The Department noted that:

> US AML/CTF legislation already requires the inclusion of customer information with funds transfers and most EU [European Union] countries will have similar provisions by January 2007. For Australian financial institutions to be able to send funds transfer instructions to corresponding banks in these countries they will soon have to include customer information, regardless of what Australian law provides.[36]

7.35 The Department maintained that the measures proposed by Schedule 9 were ones that could be effectively implemented by industry and the Government relatively quickly. It considered a six month period from Royal Assent for those amendments that, in its view, will affect industry (i.e., those amendments dealing with international funds transfer instructions and the register of providers of remittance services) was sufficient time for industry to prepare for those provisions to come into force.[37]

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33 Mr David Bell, *Committee Hansard*, 17 November 2005, p. 14.

34 *Submission 290A,* Attachment A, p. 30.

35 *Submission 290A,* Attachment A, p. 30.

36 *Submission 290A,* Attachment A, p. 29

37 *Submission 290A,* Attachment B, p. 27.

Privacy Concerns

7.36 The Australian Bankers Association, the Office of the Privacy Commissioner (OPC) and the Australian Privacy Foundation (APF) raised privacy concerns over the amendments proposed by Schedule 9 of the Bill. As mentioned above, the amendments will require:

- certain cash dealers to provide prescribed personal information to AUSTRAC;
- identifying personal information to be included in international funds instructions; and
- persons carrying 'bearer negotiable instruments' – such as travellers cheques - to prepare detailed reports to AUSTRAC containing personal information about the courier or the person on whose behalf the instruments are being carried.

7.37 The Australian Bankers Association also expressed concern that sending personal information overseas may expose customers to the risk of identity fraud.[38]

7.38 The OPC expressed concern that the amendments in Schedule 9 will impose reporting obligations on a large number of financial entities, some of which may be exempt from statutory privacy obligations governing the private sector or state and territory agencies:

> The implications of this uneven coverage of the private sector and, possibly many public agencies, is that large amounts of often sensitive financial and other personal data handled by these entities will not be protected by any privacy legislation – national, state or territory. This situation is compounded by the current obligations in Part IV of the FTR Act for financial institutions to retain data, such as customer generated financial transaction documents, for a minimum of seven years.[39]

7.39 The OPC noted that a lack of effective privacy protection could result in an unintended loss of community and business confidence in the proposed regime:

> The effective implementation of legislative measures to counter money laundering and the financing of terrorist activities will depend in large part on the willing cooperation of the business community in providing critical financial data to law enforcement agencies. This in turn will be underpinned by the understanding and confidence on the part of the community as to what happens to their financial data.[40]

38 *Submission 26*, Attachment, p. 5.

39 *Submission 276*, p. 12.

40 *Submission 276*, pp 12-13.

7.40 In support of this argument, the OPC pointed to research demonstrating notable community reluctance to deal with business in situations where concerns existed over the protection of their personal information.[41]

7.41 The OPC therefore recommended that, in view of the privacy issues involved, the amendments should be delayed pending further careful consultation and assessment as part of the planned consultation process for the proposed AML Bill. It also stressed the need to conduct a Privacy Impact Assessment in respect of the proposed amendments in Schedule 9.[42]

7.42 The above concerns and recommendation were echoed by the Australian Privacy Foundation. It characterised the amendments proposed by Schedule 9 as:

> … another example of 'a power grab by stealth' – introduction of provisions with much wider reach, which deserve much wider debate by the many interested parties, as part of supposedly purpose specific anti-terrorism legislation. The appropriate place for these provisions are in the proposed anti money-laundering legislation, which have quite properly been the subject of recent consultation at least with industry (albeit with limited opportunity for wider community input).[43]

7.43 The Department advised the committee that detailed discussion on privacy issues and the means to best address these will take place during the consultation period following release of the AML exposure draft Bill.[44] However, it maintained that the amendments should not be delayed and the current practices and requirements included the disclosure of customer information (such as account numbers). It reiterated that:

> … the inclusion of customer information with wire transfers is a requirement of FATF under Special Recommendation VII on Terrorist Financing. Financial institutions from most EU countries are expected to be required to include this type of information in wire transfers by January 2007, and these institutions will be expecting institutions with which they have correspondent banking relationships to also comply. Financial institutions from the US are already required to include customer information with wire transfers.[45]

The committee's view

7.44 The committee acknowledges the concerns raised by submissions in respect of Schedule 9 of the Bill. However, the committee also appreciates the need for prompt

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41 *Submission 276*, p.12.

42 *Submission 276*, pp 12 and 15.

43 *Submission 165*, p. 6.

44 *Submission 290A,* Attachment B, p. 34.

45 *Submission 290A,* Attachment B, p. 34.

action to progress counter-terrorist financing measures. The committee also accepts that, as stated by the Department, the concerns outlined above may be able to be accommodated within the implementation time period currently provided for the Bill's commencement provisions. Yet, it is apparent that some flexibility in this area may be required. This can be achieved by providing the amendments will commence on 'a date to be proclaimed' as opposed to a fixed date.

Recommendation 50

7.45 The committee recommends that clause 2 of the Bill be amended to provide that Schedule 9 of the Bill shall commence on 'a date to be proclaimed'.

Financing terrorism

7.46 Schedule 3 of the Bill amends the Criminal Code and FTR Act in order to 'strengthen existing terrorism financing offences'. According to the Explanatory Memorandum:

> 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.[46]

7.47 FATF, in its country evaluation report on Australia, recommended that 'Australia should specifically criminalise the collection or provision of funds for an individual terrorist, as well as the collection of funds for a terrorist organisation'.[47] FATF did so as it considered that Australia's existing terrorist financing offences did not sufficiently cover the requirements of Special Recommendation II.

Existing terrorism financing offences

7.48 Existing subsections 102.6(1) and (2) of the Criminal Code makes it an offence to receive funds from, or make funds available to, a terrorist organisation, whether directly or indirectly. Subsection 102.6(1) deals with the situation where the offender knows the organisation is a terrorist organisation. This offence carries the maximum penalty of 25 years imprisonment. Subsection 102.6(2) deals with the

46 p. 12.

47 FATF, *Third Mutual Evaluation Report on Money Laundering and Combating of the Financing of Terrorism – Australia*, 14 October 2005, para 2.2.2.

situation where the offender is reckless as to whether the organisation is a terrorist organisation, and imposes a maximum penalty of 15 years imprisonment.[48]

7.49 Existing subsection 103.1(1) of the Criminal Code makes it an offence for a person 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 maximum penalty for the offence is life imprisonment.[49]

7.50 'Knowledge' and 'recklessness' are defined in sections 5.3 and 5.4 respectively of the Criminal Code. A person has 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. A person is 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.[50]

7.51 'Terrorist organisation' is defined in section 102.1 of the Criminal Code. 'Funds' are broadly defined in section 100.1 of the Code, and cover property and assets of every kind.

Outline of the Bill's key provisions

7.52 Item 1 of Schedule 3 of the Bill will amend subsections 102.6(1) and (2) to criminalise the collection of funds for, or on behalf of, a terrorist organisation, whether directly or indirectly. The new offence is committed where 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 (102.6(2)(a)). The maximum penalties for the offences under subsections 102.6(1) and (2) will not change.[51]

7.53 Item 3 of Schedule 3 inserts proposed subsection 103.2(1) to criminalise similar conduct as that covered by existing section 103.1, but where the funds are made available to, or collected for, or on behalf of, another person. The offence will occur 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.

7.54 The Explanatory Memorandum explains in relation to Item 3:

> As recklessness [*defined above*] is a relatively high standard fault element, the proposed offence will not apply to a person who provides or collects

48 This overview of existing offences and the amendments is drawn from pp 11-12 of the Bills Digest.

49 Bills Digest, p. 12.

50 Bills Digest, p. 11.

51 The following paragraphs are draw from pp 12-13 of the Bills Digest.

> funds believing those funds will be used for an innocuous purpose, irrespective of whether the funds are in fact used for a terrorist act.[52]

7.55 Proposed subsection 103.2(2) provides that the offence is committed under proposed subsection 103.2(1) even if:

- a terrorist act does not occur;
- the funds will not be used to facilitate or engage in a specific terrorist act; or
- the funds will be used to facilitate or engage a number of terrorist acts, instead of just the one act.

7.56 The offence in proposed subsection 103.2(1) carries a maximum penalty of life imprisonment.

7.57 Proposed subsection 103.3 provides that the offences under Division 103 (which includes existing subsection 103.1(1) and proposed subsection 103.2(1)) have extended geographical jurisdiction – Category D. This 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.

7.58 Item 4 of Schedule 3 amends the definition of 'financing of terrorism offence' in subsection 16(6) of the FTR Act to include the new terrorist financing offence added by Item 3. Subsection 16(1A) of the FTR Act requires a cash dealer to report to AUSTRAC any transaction the dealer is involved in and 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.

Issues

7.59 Concerns were raised with the committee that the new offence of financing a terrorist (in new section 103.2) would allow a person to be imprisoned for life if the person *indirectly* makes funds available to another person, or *indirectly* collects funds for another, and the person is *reckless* as to whether the other person will use the funds for terrorism. That is, the person need not intend that the funds be used for terrorism, nor must they have knowledge that the funds will be used for the purpose. Also of concern was the fact that the offence is committed even if a terrorist act does not occur or the funds will not be used for a specific terrorist act.[53]

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52 p. 12.

53 See, for example, Law Council, *Submission 140*, pp 19-21 and New South Wales Council for Civil Liberties, *Submission 161*, pp 1-3.

7.60 The committee received a large number of submissions from a wide cross section of the community which argued that the above extends criminal liability too far and would make it impossible for any person to know the scope of their legal liabilities with any certainty.[54] For example, the Gilbert and Tobin Centre of Public Law submitted that:

> Terrorists obtain financing from a range of sources, including legitimate institutions (such as money laundering through banks), and employ a variety of deceptive means to secure funding. This offence would require every Australian to vigilantly consider where their money might end up before donating to a charity, investing in stocks, depositing money with a bank, or even giving money as birthday present.[55]

7.61 The key concern was that innocent, well meaning people will be caught. The Law Council noted, for example, that the proposed offence would encroach on everyday activities undertaken by many ordinary Australians:

> The proposed measure has the capacity to catch all financial transactions and everyday activities including purchasing items, paying bills, banking transactions and charitable and other collections, many of which typically do not warrant, require or allow an enquiry as to the purpose of the funds. … There is [also] no minimum amount required to commit the offence, so that the purchase of a $5 raffle ticket could be sufficient.[56]

7.62 The Australian Privacy Foundation advised the committee that:

> Individuals and organisations acting in good faith cannot be expected to know enough about these potential links to make a judgement. Criminal offences should only apply to financial contributions made in the full knowledge that they will be used to fund criminal activity. Otherwise, two things will happen - a vast number of individuals will inadvertently expose themselves to criminal prosecution, and some people will be deterred from contributing to legitimate social and political movements which criticise current government policies or even those that don't. Both are undesirable.[57]

7.63 Submitters pointed to the current controversy surrounding the Australian Wheat Board to demonstrate the uncertainties over the scope of the offence provision and its reliance on recklessness. As the Law Council noted:

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54 See for example: Australian Privacy Foundation, *Submission 165*, p. 23; Law Council, *Submission 140*, pp 19-21; Federation of Ethic Community Councils of Australia, *Submission 167,* pp 12-13; Quaker Peace and Justice NSW Committee, *Submission 183* p. 2; Queensland Council for Civil Liberties, *Submission 223,* p. 11; National Australian Bank, *Submission 209,* p. 1; PIAC, *Submission 81*, p. 29; and New South Wales Council for Civil Liberties, *Submission 161*, pp 1-3.

55 Gilbert and Tobin Centre for Public Law, *Submission 80*, p. 7.

56 Law Council, *Submission 140*, pp 19-21.

57 Australian Privacy Foundation, *Submission 165*, p. 23.

> The recent report on the Australian Wheat Board "knowingly" providing funds to the Saddam Hussein Government via a Jordanian trucking company provides an interesting example if the facts were slightly different. For example, what if the funds had flowed through to a terrorist organisation, would the Board's conduct amount to the reckless financing of terrorism?[58]

7.64 Submitters also expressed concern that the amendments would discourage donations to charitable organisations and create feelings of ill-will and suspicion within the community.[59] It was put to the committee that:

> … the Bill's provisions are likely to exacerbate community, and possibly racial, tensions as members of the public who propose to donate funds to seemingly needy groups or causes decide which recipients should be questioned, and to what extent, about how they propose to use the donated funds.[60]

7.65 Witnesses and submitters also argued that a penalty of life imprisonment was unreasonable and not proportionate for an offence which is unknowingly committed by a person.[61]

7.66 The Law Council also opposed the use of a fault element of 'recklessness'. It argued that, where a person convicted of this offence faces the real possibility of losing their liberty and serving a lengthy prison term, intention and knowledge should be the standard of fault required.[62]

7.67 In light of the above, it was put to the committee that the new financing terrorism provisions should be subject to the same review as existing terrorism laws. The Law Council of Australia noted, for example, the current financing terrorism provisions in the Criminal Code, and therefore the proposed provisions in Schedule 3 of the Bill, are excluded from review required under the *Security Legislation Amendment (Terrorism) Act 2002* (Cth).[63]

The Department's response

7.68 The Committee put the above concerns to the Attorney-General's Department.

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58 Law Council, *Submission 140, p.* Mr David Bernie, New South Wales Council of Civil Liberties, *Committee Hansard,* 17 November 2005, p. 40.

59 Law Council, *Submission 140*, pp 19-21, Islamic Welfare Council of Victoria, *Submission 150*, Dr Waleed Kadous, AMCRAM, *Committee Hansard*, 17 November 2005, p. 23. Dr Ameer Ali, Federation of Islamic Councils of Australia, *Committee Hansard,* p. 23.

60 Law Council, *Submission 140*, p. 19.

61 Law Council, *Submission 140*, p. 21, Dr Waleed Kadous, AMCRAM, *Committee Hansard*, 17 November, p. 23.

62 Law Council, *Submission 140*, p. 20.

63 Law Council, *Submission 140*, p. 21.

7.69 The Department argued that many of the concerns raised were misconstrued. It stressed that the Criminal Code 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 the Department explained:

> This means that a person would have to be aware of a substantial risk that the funds will be used by the receiver of the funds to facilitate or engage in a terrorist act, and being aware of that risk continued to provide funds or collect funds (whether directly or indirectly) for that person. The fact that the funds may be made available to the person indirectly or are indirectly collected for that person is irrelevant, unless the person engages in such conduct with the requisite state of mind. For the ordinary person who, for example, gives funds to a person believing that person is legitimately collecting money for charity or who collects funds believing that they are doing that for a legitimate charity, they will not commit an offence, irrespective of where those funds are eventually used.[64]

That is, the proposed offence will not apply to a person who provides or collects funds believing those funds will be used for an innocuous purpose, or even if they believe there is a small risk of the funds being used for terrorist purposes.[65]

7.70 The Department also advised the committee that:

> The maximum penalty of life imprisonment is considered appropriate to the gravity of the act of financing a terrorist offence. The maximum penalty is the same as that for the existing offence in section 103.1 of the Criminal Code of financing terrorism, which has been in the Criminal Code since the original terrorism offences were inserted in 2002. This offence covers essentially the same conduct and also carries a fault element of recklessness.[66]

The committee's view

7.71 The committee acknowledges the significant level of concern in respect of Schedule 3 of the Bill. However, after careful consideration and after having regard to the Department's response, the committee does not consider that these concerns warrant rejection or amendment of the Schedule. The committee also notes the onus of proof on the prosecution in criminal matters is beyond reasonable doubt. The Commonwealth Director of Public Prosecutions would have to be satisfied that a case was worth pursuing, having regard to the Prosecution Policy of the Commonwealth and related guidelines governing the exercise of the prosecutorial discretion.

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64 *Submission 290A,* Attachment A, p. 27

65 *Submission 290A,* Attachment A, p. 25.

66 *Submission 290A,* Attachment A, p. 25.

7.72 The committee does, however, accept the point that the new financing terrorism provisions ought to be subject to the same review requirements as apply to other federal terrorism provisions.

Recommendation 51

7.73 The committee recommends that the Bill be amended to provide that Schedule 3 of the Bill shall be subject to a public and independent five year review.

Recommendation 52

7.74 Subject to the above recommendations, the committee recommends that the Senate pass the Bill.

Senator Marise Payne

Chair

DISSENTING REPORT

BY GREENS SENATORS
BOB BROWN AND KERRY NETTLE

Key Points

The Greens Senators recommend this bill be opposed.

The bill undermines fundamental rights and freedoms intrinsic to democracy

1.1 The amendments recommended in the majority committee report, while improving safeguards in the bill, do not address the fundamental problem at the heart of the legislation which is detention without charge or trial. Even with the amendments proposed by the committee the new powers and offences contained in the bill would unnecessarily undermine fundamental rights and freedoms intrinsic to democracy.

There is no adequate case for the introduction of these laws

1.2 The government, ASIO and the Australian Federal Police have not made a case for why these laws are necessary to protect Australia from terrorism and have failed to demonstrate why the current laws and powers are inadequate. In contrast the overwhelming evidence to the committee was that these laws were not necessary, would breach international human rights law and, in some cases, would undermine efforts to address the causes of terrorism.

The bill breaches Australia's commitment to the International Covenant on Civil and Political Rights

1.3 Numerous submissions to the committee outlined how the legislation would violate Australia's commitments to the International Covenant on Civil and Political Rights (ICCPR). In response, assertions by the Attorney-General's Department that the bill did not breach the ICCPR rested entirely on a general claim that confidential legal advice to government that this was the case were not convincing.

The bill creates a parallel criminal system of law without existing safeguards

1.4 Since 2002, 28 pieces of legislation have been introduced to address terrorism creating a parallel criminal system of law in which many of the ordinary protections, standards and processes have been removed or modified. Central to this new system of law is a broad definition of a terrorist act which could encompass many political activities throughout the world. The Australian Greens remain concerned that these laws, along with the existing terrorism laws, could be used to suppress and criminalise

protest movements and freedom struggles, including national liberation movements such as the ANC or Fretilin in East Timor.

1.5 Some forms of civil disobedience and protest could also be covered by the definition. The recent case of American peace activist, Scott Parkin, highlights the potential dangers inherent in these laws. Parkin was deported because ASIO claimed he was a threat to national security, yet this decision was made in secret, without conventional legal protections or processes. His case as have other recent events, show the manner in which the Federal and State governments have used the fear of terrorism as a political tool.

The Greens Senators recognise the danger that terrorism poses to Australian society

1.6 However, our view is that such dangers can be addressed within the framework of our existing criminal law. Undermining our fundamental freedoms, as this bill does, is not only unnecessary but also threatens to destroy the democracy that we wish to defend.

Specific Concerns

Schedule 1—Definition of terrorist organisation etc.

1.7 The Greens Senators believe that the expanded criteria used by the Attorney-General to list an organisation as terrorist is dangerous and unnecessary. It threatens to criminalise speech which may be unpopular but is legitimate in a democracy.

1.8 The broad definition of a terrorist act and the universal jurisdiction applied in the legislation means that, for example, a person praising a protest which becomes violent, such as some recent trade summit protests, could result in the banning of their organisation. Those who express support for self-determination movements in Iraq or West Papua could fall within the definition.

1.9 Evidence to the committee highlighted the dangers in criminalising and alienating further sections of the Arab and Muslim communities that express support for Palestinian self-determination.[1]

1.10 Existing laws against incitement of violence are adequate to prosecute anyone for encouraging genuine acts of terrorism.

Schedule 3—Financing terrorism

1.11 The Greens Senators share the concerns expressed by the finance industry and other submissions that broadening the offence of financing terrorism to encompass recklessness is not justified.

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1 AMCRAN, Submission to Inquiry on Anti-Terrorism Bill (No.2) 2005 (*Submission 157*), Senate Legal and Constitutional Committee, November 2005, p. 13.

1.12 This provision creates potential uncertainly for people donating to charities or those involved in the finance industry about their legal position, if their financial involvement inadvertently or indirectly results in funding to a 'banned organisation'.

Schedule 4—Control orders and preventative detention orders

1.13 The Greens Senators believe that detention for reasons other than the prosecution and penalty for a criminal offence cannot be justified except for extraordinary reasons. The government is yet to make the case that such a situation in Australia exists at this time.

1.14 The experience of immigration detention in Australia has highlighted the dangers of detaining people without a requirement to prove before a court that the person may have committed a crime.

1.15 Evidence from the legal community, in particular the Law Council of Australia, strongly asserted that preventative detention and control orders should not be enacted.

1.16 The Law Council made the following important points which emphasise there is no case for the new powers:

- The 17 arrests made in a joint task force of federal and state police and ASIO, which have resulted in charges being laid for terrorist related offences, demonstrate the effectiveness of existing law to anticipate alleged terrorist acts;
- The current ASIO powers to detain and question suspects up to 7 days have not been used to date;
- Dennis Richardson (Former Head of ASIO) commented in May 2005 to the Parliamentary Committee reviewing ASIOs questioning and detention powers that the laws which were enacted have worked well;
- The 7 July 2005 London bombings occurred despite the existence the preventative detention orders and control orders;
- Comments by Head of Police, for example, Commissioner Moroney (NSW Police) that the lessons learned from Bali, Madrid and London are that government effort should focus on ensuring that the law enforcement agencies and intelligence authorities are properly resourced and organised to deal with terrorist activity.[2]

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2 Law Council of Australia, Supplementary Information (*Submission 140A*), Anti-Terrorism Bill (No.2) 2005, Senate Legal and Constitutional Committee, 23 November 2005, p. 3.

Schedule 6—Power to obtain information and documents

1.17 The Greens Senators recommend that the universal concerns expressed by media organisations regarding these proposals should be heeded. The broad sweeping violations of privacy that the provisions in this schedule would allow can not be justified on the grounds of efficiency.

1.18 The safeguards and protections in the existing regime for search warrants should remain.

Schedule 7—Sedition

1.19 The Greens Senators believe that a democracy should be able to withstand rigorous and robust debate even if it involves a critique that the majority disapproves.

1.20 Evidence to the committee was strongly against sedition laws in our modern democracy.

1.21 We therefore support the recommendation of the committee that Schedule 7 be removed from the bill in its entirety and we further recommend that the existing sedition laws should be repealed.

Schedule 10—ASIO powers etc.

1.22 The Greens Senators believe that the existing requirements for ASIO to obtain permission to use their extraordinary search and surveillance powers are sufficient and should remain. We recommend that ASIO should not be given additional powers to enable it to embark on fishing expeditions. The misuse of intelligence to justify the invasion of Iraq, the deportation of peace activist Scott Parkin and bungled police raids relying on ASIO advice reinforce the need for proper regulation of the intelligence agencies.

Senator Bob Brown

Australian Greens

Senator Kerry Nettle

Australian Greens

ADDITIONAL COMMENTS

BY SENATOR LINDA KIRK

Constitutional Validity

1.1 I have significant concerns about the constitutional validity of aspects of the preventative detention and control order provisions of the Bill. If these are not addressed, there is considerable potential for a successful constitutional challenge to central features of the Bill, undermining its national security objectives.

1.2 Witnesses from the Attorney-General's Department assured the Committee they had received advice from the Solicitor-General and Chief General Counsel for the Commonwealth that the Bill is consistent with the Constitution, particularly the requirements of Chapter III. They were not however prepared to provide this advice to the Committee.

1.3 Numerous other witnesses expressed significant doubts about the consistency of sections of the control order and preventative detention provisions with the requirements of Chapter III. These can be summarised as follows:

Control Orders – Division 104

1.4 Witnesses from the Attorney-General's Department submitted that the power to issue control orders is a judicial function, due to its potentially punitive operation, and is therefore appropriate to exercise by Chapter III courts in the exercise of the judicial power of the Commonwealth.

1.5 According to the Law Council of Australia and other witnesses who appeared before the Committee, in giving the Federal Court, Family Court and Federal Magistrates Court the power to make control orders, the Bill potentially confers on these courts non-judicial power inconsistently with the requirements of Chapter III. According to these witnesses, the making of control orders is not in accordance with the judicial process, particularly the rules of natural justice, and is not therefore an exercise of judicial power.

1.6 The constitutional difficulty presented by control orders could be addressed by amendments to the Bill to ensure that the process for making the control orders by the 'issuing courts' is in accordance with the judicial process. This requires an open hearing subject to limited exceptions, the presence of the affected party, and the application of the rules of natural justice and the rules of evidence.

Preventative Detention Orders – Division 105

1.7 The Bill purports to confer the power to issue continued preventative detention orders on Federal Court judges, State/Territory Supreme Court judges,

retired Chapter III court judges or State Supreme Court or State District/County court judges or a President or Deputy President of the Administrative Appeals Tribunal.

1.8 The power to issue preventative detention orders is a non-judicial function and the Attorney-General's Department advised the Committee that that their legal advice was that this function could be invested in Federal Court judges in their personal capacity, as persona designata. Again, this advice was not provided to the Committee.

1.9 Other witnesses told the Committee that there was the potential that this non-judicial function could be considered incompatible with the judicial role of federal judges and State/Territory judges who may be invested with federal jurisdiction. Witnesses from the Gilbert and Tobin Centre emphasised that this non-judicial function invested in these judges has the potential to 'seriously compromise the integrity, independence and reputation of judicial office, undermining public confidence in the judiciary.'

1.10 The constitutional difficulty presented by this could be overcome simply by removing serving federal and State/Territory judges from the panel authorised to make continued preventative detention orders.

Review of Preventative Detention Orders – proposed sections 105.51 and 105.52

1.11 An application may be made to the Security Appeals Division of the Administrative Appeals Tribunal (AAT) for review of the decision of an issuing authority to make or extend a preventative detention order pursuant to proposed section 105.51. However, such an application can only be made after the order expires. Whereas a person can obtain judicial review (common law and constitutional writs) to challenge the legality of the decision during the duration of their detention, they cannot challenge the merits of the decision to detain until the expiration of the order.

1.12 As the making of a preventative detention order is a non-judicial function, the proper place for merits review of the order is an administrative body such as the AAT. There does not however appear to be any justification for excluding merits review of the order during the duration of the detention.

1.13 There is provision for review and the granting of remedies by a State or Territory court of a Commonwealth preventative detention order in circumstances in which a corresponding state preventative detention order is made under proposed section 105.52. The Court may require that the Commissioner of the Federal Police provide to the Court and the parties the information that was put before the person who issued the Commonwealth order when the application for the order was made. Such information need not be disclosed where the information is likely to prejudice national security within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

1.14 There is no provision in proposed section 105.51 which provides for similar information to be provided to the AAT on a merits review. As the Law Council submitted, the consequence of this is that the AAT would not have the required information to conduct a meaningful review of the merits of the preventative detention order.

1.15 These problems could be addressed by amendments to the Bill which permit merits review of preventative detention orders by the AAT during the duration of the detention. In addition, a provision which allows the AAT to require that the Commissioner of the Federal Police provide to it and the parties the information that was put before the person who issued the Commonwealth order when the application for the order was made. Such information need not be disclosed where the information is likely to prejudice national security within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

Senator Linda Kirk

Australian Labor Party

ADDITIONAL COMMENTS AND POINTS OF DISSENT

BY SENATOR NATASHA STOTT DESPOJA ON BEHALF OF THE AUSTRALIAN DEMOCRATS

1.1 The Democrats agree with a majority of the recommendations presented in the Chair's report.

1.2 We commend the Chair and the Secretariat for their efforts.

1.3 We believe that this Bill as introduced will erode key legal rights and undermine crucial civil liberties. It is a fundamentally flawed piece of legislation and the Democrats remain opposed to the Bill in its current form.

1.4 This Bill epitomises the Government's approach to power. The method in which it attempted to pass this legislation is an affront to democracy and belies its commitment to the Australian public to act in a responsible and representative manner.

1.5 The content of the Bill has been appropriately described as draconian and arguably represents a disproportionate response to the terrorist threat Australia is facing. A convincing argument as to the inadequacy of existing laws and the corresponding necessity for such expansive new laws was absent during the inquiry into this Bill.

1.6 The inadequacy of the Bill was highlighted in the inquiry process. The Democrats are pleased to have been responsible for moving successfully to extend the inquiry period to three weeks rather than a potential farcical, one day inquiry.

1.7 We believe a majority of the recommendations contained in the Chair's report will improve the Bill and lessen the potential for abuses of human rights but provide the following additions:

International Law

1.8 This Bill allows for potential breaches of international human rights law on a number of grounds.

1.9 We note the discussion of derogation from the ICCPR in the Chair's report and add that the Bill potentially threatens rights under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *Convention of the Rights of the Child.*

1.10 The Democrats note the discussion of the issue of prohibited contact orders in the Chair's report. However, we are deeply concerned by examples of the Government's denial of the implications of this legislation, as stated by representatives of the Government.

1.11 In a response to my question on notice about whether any measures were taken to ensure that this legislation met with international human rights obligations, the Attorney-General's Department made the following point:

> Preventative Detention is not incommunicado detention. Incommunicado detention involves complete isolation from the outside world such that not even the closest relatives know where the person is located.[1]

1.12 The Democrats note this statement with alarm. Section 105.40 provides that any "entitlement" a detainee has to make contact with relatives, the Ombudsman or their lawyer is subject to a prohibited contact order. This effectively removes any entitlement to contact, therefore allowing for a person to be held incommunicado for the duration of their detention.

1.13 During the inquiry, I asked a series of questions of the Public Interest Advocacy Centre (PIAC) on the relationship between the Bill and international human rights law.

1.14 In response to this questioning, Ms Stratton from the PIAC stated that the Bill in its current form has the potential to allow for human rights breaches.[2]

1.15 In order to "get a very clear perspective…on the issue of enshrining or making reference to the international laws and conventions" in the Bill, I posed the following questions:

> You have given us a list in your submission of rights and freedoms that are potentially affected or could be breached as a consequence of this legislation. What are you seeking to do? How do we ensure proportionality in this Bill?[3]

1.16 Ms Stratton responded by stating that "explicit acknowledgement" of international instruments in the Bill would be necessary for this purpose and raised a salient point:

> If the Government is confident that upon its advice there are no human rights problems then why not give the undertaking and give people the assurance that every other comparable jurisdiction have by virtue of an

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1 Attachment A, Attorney-General's Department, Responses to Questions Placed on Notice by Senators during the *Senate Legal and Constitutional Committee Inquiry into the provisions of the Anti-Terrorism Bill (No. 2) 2005*, Monday, 14 November 2005, p. 2.

2 *Committee Hansard*, Monday 1 November 2005, p. 37.

3 *Committee Hansard*, Monday 1 November 2005, p. 37.

> independent constitutionally entrenched charter of rights? If we are not to have that, then why not give the assurance in the Bill?[4]

1.17 Similarly, the Human Rights and Equal Opportunity Commission (HREOC) "endorses the incorporation of international human rights norms into domestic law."[5]

1.18 The absence of a Bill of Rights in Australia places an obligation on the Government to incorporate consideration of protections for fundamental rights and freedoms.

Recommendation 1

1.19 That the *International Covenant on Civil and Political Rights*, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *Convention on the Rights of the Child* be incorporated in the Bill to allow for it to be regarded in relation to the Bill's operation.

Legal Professional Privilege

1.20 The restrictions on communication between a detainee and their lawyer under sections 105.37 and 105.38 of the Bill generate justifiably a sense of alarm, particularly from the legal community.

1.21 The Democrats believe that this Bill abandons a fundamental legal principle that provides the foundation for legal professional privilege.

1.22 Attempts to abrogate the relationship of trust and confidentiality between a detainee and their lawyer is gravely concerning.

1.23 A relationship of this kind is essential to the duty held by a legal representative to their client and allows for the client to be fully and fairly represented, in accordance with their well established democratic right.

1.24 The Castan Centre for Human Rights described the treatment of lawyers in the Bill as "potential co-conspirators".[6]

1.25 The Democrats oppose any monitoring of communication between detainees and their legal representatives.

1.26 As the Law Council said in its submission:

> The monitoring of contact with a lawyer is repugnant and unnecessary and should be removed.[7]

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4 *Committee Hansard*, Monday 1 November 2005, p. 37.

5 *Submission 158,* p. 4.

6 *Submission 114*, p, 17.

7 *Submission 140*, p, 4.

1.27 Amnesty International pointed out that:

> Under international human rights law, communications between an accused and their counsel are and must be confidential.[8]

1.28 While the Democrats appreciate there is a distinction in that a person subject to a preventative detention or control order is not necessarily "accused" of a crime, we argue that the absence of criminal charges creates an even stronger argument for the protection of their human rights.

1.29 As the Castan Centre for Human Rights rightly asserts, whether a person is accused of a crime or not:

> The right to communicate in confidence with one's lawyer is paramount.[9]

Recommendation 2

1.30 That all provisions placing restrictions on and requiring monitoring of communication between detainees and their legal representatives be removed from the Bill.

The Treatment of Children Aged 16 to 18

1.31 The Democrats raised a number of issues in relation to the treatment of children aged 16 to 18. We support the recommendations of the Committee that minors be separated from adults in detention.

1.32 The idea that the Government is attempting to legislate so that children as young as 16 may be subject to preventative detention and control orders, measures already of extreme concern in relation to their application to adults, is inexcusable.

1.33 Firstly, the Democrats oppose the application of the Bill to children aged 16 to 18. There are possibilities for breaches of the *Convention on the Rights of the Child* (*CRC*) under this Bill. Most notably Article 37, which provides that States Parties shall ensure that:

> (b) 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;
>
> (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

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8 *Submission 141*, p, 27.

9 *Submission 114*, p16.

> (d) 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.

1.34 In addition, Amnesty International has asserted that the control order provisions in the Bill potentially breach Article 40 of the *CRC*. Article 40 provides that a child is presumed innocent until proven guilty yet, the operation of control orders imposes a penalty without charge or the opportunity to answer a charge.[10]

1.35 Protection against threats to these rights could be guarded against by enshrining the Convention in the Bill as recommended above.

1.36 The Democrats note and support the comments of the Northern Beaches Civil Rights Forum in relation to child advocates. Child advocates should be provided for children subject to preventative detention orders and control orders; and for those affected by proximity to other individuals subject to such orders.

> The Forum urges the Senate to ensure that all state and federal agencies dealing with counter-terrorism be required to have a protocol for protecting children caught in operational matters. This should take the form of an independent child protection officer who attends all raids. While it will not lessen the fear or trauma suffered by children caught in such actions, it will provide a greater guarantee that the best interest of the child is served and that excesses are curbed.
>
> Experience over many years with Immigration Department Compliance raids has amply demonstrated the damage that can be caused to children placed in such traumatising situations. To be invaded in the "safe" environment of home – or worse - woken from sleep by strangers in dark uniforms with weapons and strong lights displaying shouting, aggressive attitude is, literally, a child's worst nightmare.[11]

Recommendation 3

1.37 The training and appointment of an independent child welfare and advocacy officer to oversee the health and welfare of children in preventative detention and children subject to control orders.

Mental Health of Detainees

1.38 The Democrats also have concerns in relation to detainees with mental health issues.

1.39 The Democrats note the evidence of Mr Von Doussa for HREOC who stated:

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10 *Submission 141*, p. 23.

11 *Submission 191*, p. 7.

> If a person has a mental illness of some sort, being cut off from their support mechanisms, and particularly being confined…could be disastrous for that person. It is not clear in the legislation what access there would be to mental health support…Those issues could be dealt with in a protocol, but at the moment the legislation is silent about that.[12]

1.40 The issue of introducing a protocol for the treatment of those subject to preventative detention and control orders was suggested by HREOC.

1.41 HREOC's proposal was to create a protocol similar to that which exists under the *ASIO Act 1979* in relation to the way people are detained under that act. Additionally, Mr Von Doussa referred to the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, developed by the United Nations Office of the High Commissioner for Human Rights, which he suggested could also be useful as a guide.[13]

Recommendation 4

1.42 That a protocol be established for the treatment of people subject to control and preventative detention orders.

Authorisation of Orders

1.43 It is of concern to the Democrats that senior AFP members are granted the authority under this legislation to place people under initial preventative detention or control orders. The Democrats do not believe that this is appropriate or necessary.

1.44 The Public Interest Advocacy Centre remarks that:

> An issuing court is asked to sit as secondary decision-maker rather than as a court. The more appropriate arrangement would be for the court to be required to make the determination as to whether a control order is necessary in all circumstances, rather than approving or varying a decision made by the AFP with the Attorney-General.[14]

1.45 Australian Lawyers for Human Rights state in their submission to the inquiry:

> The use of an executive warrant (rather than a judicial warrant) may be characterised as disproportionate to the aim of detaining a person and in that way is characterised in human rights jurisprudence as "arbitrary" even though it is prima facie authorised at law. Accordingly, the executive warrant proves breaches Article 9(1) of the *ICCPR*.[15]

1.46 The Democrats are also concerned about the ability of judicial officers and some non-judicial tribunal members to confirm preventative detention orders. The

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12 *Committee Hansard*, Thursday 17 November, p. 48.

13 Adopted by General Assembly resolution 43/173 of 9 December 1988

14 *Submission 142*, p. 32.

15 *Submission 139*, p. 16.

Democrats believe that this function would be more appropriately discharged by a Federal Court or State Supreme Court judge with knowledge and understanding of matters akin to criminal law.[16]

Recommendation 5

1.47 That preventative detention and control orders should be issued by a Federal Court or a State Supreme Court. If this recommendation is not adopted we recommend that, following the issue of an initial order by the AFP, such a court will review the issue of the order in all the circumstances.

Access to Judicial Review

1.48 The Democrats strongly oppose the denial of access to full judicial review for those subject to preventative detention orders. Coupled with the lack of transparency inherent in the process of making such orders, this seriously jeopardises the opportunity for people to satisfactorily challenge an order made against them.

1.49 This is an essential safeguard as the Law Council identifies:

> The extraordinary measures found in this Bill will confer great and unusual powers on the executive.[17]

Recommendation 6

1.50 The Democrats recommend that full access to applications for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* be provided to those subject to both preventative detention and control orders.

Impact on Privacy

1.51 The Democrats have strong concerns in relation to the impact of the legislation on privacy and do not believe that the Federal Privacy Commissioner's suggestions have been acknowledged by the Government.

1.52 The Democrats believe all legislation affecting the privacy of Australians should require the Government to seek advice from the Office of the Federal Privacy Commissioner prior to its introduction.

1.53 I sought to ascertain during the inquiry whether such advice had been given and whether the Commissioner was satisfied with the Bill. The Attorney-General's Department was ambiguous on this but the Commissioner's submission makes her concern in relation to the Bill clear.

16 *Submission 140*, p. 11.

17 *Submission 140*, p. 10.

1.54 The Democrats note with concern the many and varied dimensions of privacy that this Bill will affect. These include: bodily privacy, territorial privacy, communications privacy, freedom from surveillance and information privacy.[18]

1.55 For example, section 104.5(3) provides that, in addition to being subject to the obligations, prohibitions or restrictions, of a control order, an individual may be photographed and fingerprinted. This can all occur without charges being laid.

1.56 One of the most intrusive aspects of the control order provisions, section 104.5(3)(d), requires a person subject to an order to wear a tracking device at all times. This is a disproportionate requirement of a person who has not been charged.

1.57 In relation to Schedule 8 of the proposed legislation on optical surveillance, the Office of the Federal Privacy Commissioner stated:

> …such technology allows for the routine and indiscriminate surveillance of large numbers of people, for example, in public spaces in airport arrival halls.[19]

1.58 According to the Office of the Victorian Privacy Commissioner:

> Privacy will be adversely affected by the Bill's provisions for control orders, preventative detention, powers to stop question and search, surveillance, warrantless information demands, and compulsory reporting of financial transactions. Each will affect, to varying degrees, the privacy of individuals in relation to whom the provisions are exercised. In many instances, there will also be adverse effects on the privacy of persons who are related to or associated with those individuals.[20]

1.59 It must be ensured that the personal information collected by CCTV is consistent with the principles of the Privacy Act, according to the Commissioner. This could be ensured through an amendment to section 74K(2) of the *Aviation Transport Security Act 2004,* as suggested by the Privacy Commissioner.

1.60 We have seen a steady erosion of privacy rights in Australia in recent years. While recognising that privacy is not an absolute right, and privacy protection requires a balance with other considerations, the Democrats believe the balance has been tipped in favour of privacy intrusion.

1.61 The combination of an expansion in the powers of law enforcement and intelligence agencies facilitated by these laws, and laws such as the *Telecommunications (Interception) Act 1979,* will have a further dramatic cumulative corrosive effect on privacy for Australians.

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18 *Submission 276*, p. 1.

19 *Submission 276*, p. 9.

20 *Submission 276*, p. 1.

1.62 We strongly support additional resources for the currently under-resourced Office of the Federal Privacy Commissioner to ensure that proposed laws dealing with law enforcement and security powers are properly scrutinised by the Commissioner.

1.63 We note the discussion contained in the Chair's report of the doubling of the size of ASIO over the next 5 years and would welcome a corresponding increase for the Commissioner. This contrast in priorities is another clear example of the Government's seeming lack of regard for the basic privacy protection of Australians.

Recommendation 7

1.64 That section 74K(2) be amended as the Privacy Commissioner has suggested to ensure the protection of personal information obtained through the use of CCTV.

Recommendation 8

1.65 That the resources of the Office of the Federal Privacy Commissioner be increased.

Recommendation 9

1.66 That the laws be analysed by the Federal Privacy Commissioner for their impact on the privacy of Australians and this report (including recommendations) be tabled in Federal Parliament.

Absence of a Bill of Rights

1.67 This Bill's dramatic implications for human rights and civil liberties are even more concerning, given Australia does not have a Bill of Rights or Human Rights Act.

1.68 As the only common law country without such protection, the basic human rights of Australians are subject to greater risk than the rights of citizens of these other nations.

1.69 While a number of the provisions contained in this Bill emulate the United Kingdom's laws, it does not contain the UK's accompanying protections for human rights and civil liberties.

1.70 The *Human Rights Act* and the *European Convention on Human Rights* provide citizens of the United Kingdom with an avenue of appeal and an opportunity for judicial review when their Government infringes on these rights.

1.71 The absence of a Bill of Rights or Human Rights Act exposes needlessly Australians to unjust infringements on their rights and freedoms.

1.72 Currently, provided that the Parliament makes its intention clear, it can pass legislation violating almost any human right, with the exception of the few express rights which are protected by the Constitution including the right to trial by jury and freedom of religion. However, even these express rights are limited, for instance, trial

by jury applies only where the Commonwealth has determined that a trial is to be "on indictment". In other words, it operates at the discretion of the Commonwealth.

1.73 A Bill of Rights is about protecting people and ensuring that our Government remains accountable for its actions.

1.74 Bills of Rights generally cover rights such as freedom of religion; freedom of peaceful assembly; freedom of association; the right to vote; the right to a fair trial; the right to life, liberty and security of the person; the right not to be arbitrarily detained; the right not to be subjected to cruel and unusual treatment; equality before the law; and, the right not to be discriminated against.

1.75 For example, the New Zealand *Bill of Rights Act* covers a range of civil and political rights. The United Kingdom's *Human Rights Act 1998* incorporates rights set out in the European Convention on Human Rights including the rights to property, education and free elections, and the abolition of the death penalty. Canada's *Charter of Human Rights and Freedoms* includes the right to affirmative action and cultural rights. The *South African Bill of Rights* is striking for its broad coverage of rights. It includes economic and social rights such as access to housing, health care, food, water and security, and rights such as that to a healthy environment and also property rights.

1.76 The Democrats' *Parliamentary Charter of Rights and Freedoms Bill* is on the Senate Notice Paper and the Democrats will continue to advocate for an Australian Charter of Rights and Freedoms.

Recommendation 10

1.77 That Parliament enact a *Parliamentary Charter of Rights and Freedoms Bill* to provide Australians with basic protections against which legislation that potential infringes on human rights and civil liberties may be moderated.

Sunset Clauses

1.78 In relation to the inclusion of a sunset clause in the Bill, the Democrats believe that the current proposal of ten years is grossly inadequate. We note the recommendation of a five year sunset clause in the Chair's report and agree that the period during which the sunset clause is in place must be reduced.

1.79 We are not convinced by the Attorney-General's Department's response to the inquiry that a ten year period is necessary. It was suggested that this was due to the "thought that it will be used very rarely".[21]

21 Mr Geoff MacDonald, Attorney-General's Department, *Committee Hansard*, Monday 1 November 2005, Senate Legal and Constitutional Committee Inquiry into the Anti-Terrorism Bill (No. 2) 2005, p. 15.

1.80 The Democrats believe that to allow for the operation of such extensive and invasive powers for such a long period of time on the contingency that they may be used rarely is dangerous and unwise.

1.81 A reduction in the length of the sunset clause for this legislation is widely supported. In its submission to the inquiry, HREOC suggested that a more appropriate expiration for the legislation would be four to five years.[22]

1.82 The Gilbert and Tobin Centre for Public Law suggested a sunset clause of three years should be enacted due to the "uncertainty and speculation involved" in predictions of the nature and extent of the terrorist threat Australia will continue to face.[23]

1.83 A three year sunset clause would be reasonable and appropriate given the operation and impact of legislation.

Recommendation 11

1.84 The Democrats believe a that the Bill be amended to include a sunset clause of 3 years.

Sedition

1.85 The Democrats are strongly opposed to the sedition provisions contained in this legislation. We have argued against their inclusion and believe they should be removed from the Bill.

1.86 The Democrats note that the substantial discussion of the issues relating to the proposed sedition laws in the Chair's report and agree with the evidence provided therein.

1.87 There is a strong argument in favour of repealing the existing laws relating to sedition which have been characterised as "dead letter law" and have no place in contemporary democratic and free societies.

1.88 In evidence provided to the Committee, Mr Chris Connolly for the Arts and Creative Industries of Australia submitted:

> It is almost without exception that modern democracies have repealed sedition laws or recognised them as obsolete.[24]

1.89 At a minimum, we support the Chair's recommendation that Schedule 7 be removed entirely from this legislation pending review.

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22 *Submission 158*, p. 25.

23 *Submission 80*, p. 24.

24 *Committee Hansard*, Thursday, 17 November p. 4 – see the Chair's Report pp 69-125 for discussion.

Conclusion

1.90 The Democrats do not believe that sufficient justification has been provided for the extended and unprecedented powers it is seeking under this legislation.

1.91 In the absence of evidence supporting this Bill as a proportionate response to terrorism, the Democrats consider that the current powers of ASIO and the AFP are adequate.

1.92 This Bill should not be passed without a balance being struck between the security imperative and the need to preserve civil liberties and safeguard human rights. This Bill should be rejected.

Senator Natasha Stott Despoja

Australian Democrats

APPENDIX 1

SUBMISSIONS RECEIVED

1	Mr David G. Pennington
2	Mr Hani Eljamal
3	Mejda Eldan
4	Mejed El-Dan
5	Mr Sam Adie
6	A Rashid Samnakay
7	Mrs Candice Trevor
7A	Mrs Candice Trevor
8	Dr Greg Carne
9	Ms Lisa Farrall
10	Mr Adam Parker
11	Reyhan Yilmaz
12	Australian Section of the Freedom Socialist Party and Radical Women
13	Dr Andrew G. Christy
14	Ms Christine Banks
15	Mr Paul Lickorish
16	Bob Phelps & Marsha Emerman
17	Australian Council for Civil Liberties
18	Ms D. Beryl Phillips
18A	Ms D. Beryl Phillips
19	Name Withheld
20	Ms Kristi Street
21	Mr Russell Langfield

22 Dr Sue Bettison

23 Jothi Kalna

24 Mr Adam Bonner

24A Mr Adam Bonner

25 Congregational Leaders' Conference of Aotearoa New Zealand

26 Australian Bankers' Association Inc.

26A Confidential

26B Australian Bankers' Association Inc.

27 Mr Ray Bergmann

28 Asian Center for the Progress of Peoples

29 Confidential

30 Mr Tim Mackney

31 Mr Adrian Pellas-Rice

32 Mr Geoff Taylor

32A Mr Geoff Taylor

32B Mr Geoff Taylor

32C Confidential

33 Mr G. Dale Hess & Ms Marion H. Arnold

34 Mr Loris Erik Kent Hemlof

35 Mr David & Mrs Trish Johnson

36 Glenn, Nicola & Danielle Bradbury

37 Ingolf Eide

37A Ingolf Eide

38 Professor Joseph A. Camilleri

39 Ms Judy Bamberger

39A Ms Judy Bamberger

40 Mr Jeff Burman

41 Dr J. Keith Atkinson

42 Mr Jim South

43 Earle Orenstein

44 Dr Neil Allen

45 Standard Form Letter 1

46 Standard Form Letter 2

47 Standard Form Letter 3

48 Standard Form Letter 4

49 Standard Form Letter 5

50 Standard Form Letter 6

51 Mr David Spacey

52 Emeritus Professor Robert White

53 Mr Murray Rosenberg

54 Frayne Dyke-Walker

55 Ms Joanne Scicluna

56 Mr Chris Connolly

57 Mr Grant Niemann

58 Mr John Cumming

59 Civil Liberties Australia (ACT) Inc.

60 Mr Andy Jackson

61 Confidential

62 International PEN, Melbourne Centre

63 Mr Robert Pembroke

64 ASFA

65 Ms Beth Hatton

66 Religious Society of Friends (Quakers) Peace and Social Justice Committee

67 Mr Kriston Terbutt

68 Mr Harold Taskis

69 Mr John Somerville

70 Dr Justin Clemens

71 Mr Oliver Lawrance

72 Ms Kathryn Pollard

72A Ms Kathryn Pollard

73 Mr Sacha Blumen

74 Dr John Tomlinson

75 Mr Chris Shaw

76 Ms Susan Margaret

77 Ms Heather Morton

78 Mr Frank Chesworth

79 Ms Nathalie Haymann

80 Gilbert + Tobin Centre of Public Law

80A Gilbert + Tobin Centre of Public Law

81 Mr Joo-Cheong Tham & Others

82 Mr Christopher Michaelsen

83 Mr Charles Rowland

84 Dr Stephen Morey

85 Mr Sid Spindler

85A Mr Sid Spindler

86 Ms Pamela A Sidney

87 Australian Lawyers Alliance

88 Fairfax

89 Emeritus Professor Basil Johnson

90 Ms Gayle Reynolds

91 Mr David Cooper

92 Friends of the Earth Australia

93 Ms Diana Simmons

94 Mr Francis James Cross

95 Ms Margaret Dingle

96 Mr Greg Burgess

97 Mr Clive Monty

98 Mr Herbert Rhead & Ms Sadie Ursula Stevens

99 Ms Shirley Ferguson

100 Mrs Gwen Lee

101 Mr Dean Jefferys

102 Mr David Hall

103 Mr Herbert Thomas Hodges

104 Mr Paul Robb

105 Mr Ron Morris

106 Adelaide Institute

107 Ms Deanna Borland

108 Mr Roger Clarke

109 Ms Madeline Fountain

110 Mr Trevor and Mrs Lerida Harrison

111 Al Ray

112 Dr Gideon Polya

113 Professor Ian North & Ms Mirna Heruc

114 Castan Centre for Human Rights Law

114A Castan Centre for Human Rights Law

114B Castan Centre for Human Rights Law

115 Free Speech Australia

116 Mr Dale Mills

117 Ms Lisa Walker

118 Ms Emma King

119 Asif Zaman

120 Valerie & Eric Gargett

121 Religious Society of Friends (Quakers) in Canberra

122 Mr Ian Russell

123 Mr Kurt Duval

124 Ms Gisela Stieglitz

125 Ms Kylie Dearston

126 Mr Geoffrey Shaw

127 Helen & Peter Curtis

128 Ms Julia DesBrosses

129 Kirk McKenzie

130 Dr Ali Alizadeh & Others

131 Dr Philip G Claxton

132 The Tasmanian Council of Civil Liberties (Inc).

133 Name Withheld

134 Mr Michael Cordover

135 Columban Mission Institute

136 M F McAuliffe

137 Women Lawyers Association of New South Wales

138 Platinum Assest Management

139 Australian Lawyers for Human Rights

140 Law Council of Australia

140A Law Council of Australia

141 Amnesty International Australia

141A Amnesty International Australia

142 Public Interest Advocacy Centre

142A Public Interest Advocacy Centre

143 Australian Press Council

144 Ethnic Communities Council of WA

145 National Association of Community Legal Centres

146 Australian Screen Directors Association Ltd

147 New South Wales Teachers Federation

148 Centre for Human Rights Education

149 Free TV Australia

150 Islamic Women's Welfare Council of Victoria Inc

151 Australian Publishers Association

152 Mr Patrick Emerton & Mr Joo-Cheong Tham

153 Representative of the Arts and Creative Industries of Australia

154 Human Rights Office

155 Combined Community Legal Centres' Group (NSW) Inc

156 Chief Minister Jon Stanhope MLA

157 Australian Muslim Civil Rights Advocacy Network

157A Australian Muslim Civil Rights Advocacy Network

158 Human Rights and Equal Opportunity Commission

158A Human Rights and Equal Opportunity Commission

158B Human Rights and Equal Opportunity Commission

159 National Tertiary Education Union

160 Tasmanian Bar Association

161 NSW Council for Civil Liberties

161A NSW Council for Civil Liberties

162 Australian Political Ministry Network (PolMin)

163 Commonwealth Ombudsman and Inspector-General of Intelligence and Security

163A Commonwealth Ombudsman and Inspector-General of Intelligence and Security

164 Special Broadcasting Service (SBS)

165 Australian Privacy Foundation

166 National Association for the Visual Arts Ltd

167 Federation of Community Legal Centres

168 Division of Law, Macquarie University

169 Ms Georgina Fitzpatrick

170 Name Withheld

171 Bayside Reconciliation Group

172 Ms Jan Jackson

173 Mr Tony Kevin

174 Ms Mary Sweetapple

175 Professor Marcus Wigan

176 Professor Michael Coper

177 Mr Patrick O'Leary

178 Mr Tony Moran

179 Ms Rosslyn Ives

180 Mr Francis Taylor

181 WA Social Justice Network

182 Mr Christian O'Brien

183 Quaker Peace and Justice NSW Committee

184 Australian Centre for Independent Journalism

185 Dr Martin Wesley-Smith, AM

186 Professor Richard Hill and Rev. Chris Lockley

187 Dr Penelope Matthew

188 Sydney Centre for International and Global Law

189 Lesbian & Gay Solidarity Melbourne

190 Fitzroy Legal Service

191 Northern Beaches Civil Rights Forum

192 Uniting Church in Australia

193 Mr Allan Behm

194 Mr Bret Walker SC

194A Mr Bret Walker Sc

195 Australian Federal Police

195A Australian Federal Police

196 Australian Broadcasting Corporation (ABC)

197 Australian Catholic Social Justice Council

198 The Media, Entertainment and Arts Alliance

199 Mr David Winderlich

200 Armidale Community Network

201 Federation of Ethnic Communities' Councils of Australia (FECCA)

202 James White and Meredith Hope

203 National Legal Aid Secretariat

204 Ms Shelley Frawley

205 International Commission of Jurists Tasmania Branch

206 Professor Andrew Byrnes, Professor Hilary Charlesworth & Ms Gabriele McKinnon

207 Ms Martine Moran

208 Tasmania Government

209 National Australia Bank

210 Prof Simon Bronitt, Miriam Gani, Dr Mark Nolan and Dr John Williams

211 The National Children's and Youth Law Centre

212 Ms Irma Lachmund

213 Leichhardt Peace Group

214 Mr Robert Fox

215 Ms Tora Blackman

216 Veronica and Ray Cox

217 Ms Ruth Kell

218 Mr Mark Kernich

219 Ms Katrina Budrickis

220 Mary Mackillop Institute for East Timor

221 Liberty Victoria

222 Queensland Law Society and Bar Association of Queensland

223 Queensland Council for Civil Liberties

224 Ms Tracie Carvin

225 Devasia Family

226 Islamic Council of Victoria

227 Confidential

228 Dr Deryn Alpers

229 Ms Emma Jack

230 Associate Professor Steven Bellman

231 Mr David Langsam

232 Friends of the Earth Kuranda

233 Conference of Leaders of Religious Institutes (NSW)

234 Mr Nicholas Miller

236 Ms Georgia King-Siem

237 The Hon Alastair Nicholson, Mr John Tobin, Mr Danny Sandor, Ms Paula Grogan and Ms Carmel Guerra

237A The Hon Alastai Nicholson, Mr John Tobin, Mr Danny Sandor, Ms Paula Grogan and Ms Carmel Guerra

237B The Hon Alastai Nicholson, Mr John Tobin, Mr Danny Sandor, Ms Paula Grogan and Ms Carmel Guerra

238 Mr Kenneth Kuhlmann

239 Ms Wendy Alpers

240 Ms Michelle Pratley and Ms Kate Parlett

241 Mr Alex Reisner

242 Mr Steven Hopley

244 Mr Tom Dawkins

245 Ms Rosaline Costa

246 Mr Martin Bibby

247 Dr David Neal

248 Ms Marion May Campbell

249 Artlink Australia

250 Confidential

251 Ms Allison Riding

252 Timothy Collier and Bruce Hancock

253 Ms Margaret Waspe

254 Ms Catrine Warner

255 NOWAR SA

256 Ms Sandy Edwards

257 Ms Catherine Errey

258 Mr Peter A Gillies

259 The Uniting Church in Australia Synod of Victoria and Tasmania

260 Mr Matthew Zagor

261 Public Interest Law Clearing House (Vic) Inc.

262 Administrative Review Council

263 Mr Lucas Robson

264 Associate Professor Jenny Hocking

265 Ms Naomi Mawson

266 Jen Jewel Brown

266A Jen Jewel Brown

267 Mr Adam Johnston

268 Ms Nicole Hodgson

269 Ms Susan Armer

270 Mr Fred Hollis

271 Mr Peter Smiley

272 Mr Justin Tutty

273 Ms Helen Needs

274 Ms Kim Wainwright

275 Mr Laurence Maher

275A Mr Laurence Maher

276 Office of the Privacy Commissioner

277 The Religious Society of Friends (Quakers) WA Inc

278 Dr Helen B Wiles

279 Humanist Society of Victoria Inc.

280 Mr David Owen

280A Mr David Owen

281 Mr William J.A. Ryan

282 Ms Shirley Hodges

283 Dr Chrissy Sharp

284 ACT Bar Association

285 Mr John McLaren

286 Mr Sebastian Clark

287 Confidential

288 La Trobe Law and West Heidelberg Community Legal Service

289 Ms Joan Coxsedge

290 Attorney-General's Department

290A Attorney-General's Department

290B Attorney-General's Department

291 Confidential

291A Confidential

292 Ms Marilyn Shepherd

293 Office of the Victorian Privacy Commissioner

294 Australian Securities Intelligence Organisation

TABLED DOCUMENTS

14 November 2005 – Attorney-General's Department

- Draft South Australia Terrorism (Preventative Detention) Bill 2005

17/11/2005 Mr Ian Carnell, Inspector General

- Detention Safeguards: Some Procedural Comparisons

17/11/2005 Mr Chris Connolly, Law Faculty, University of NSW

- Proposed Offences for Sedition in the Anti-Terrorism Bill 2005, Five Key Facts on Sedition

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Sydney, Monday 14 November 2005

Attorney-General's Department (Submission 290)

Mr Geoff McDonald, Assistant Secretary, Security Law Branch, Security and Critical Infrastructure Division

Ms Kirsten Kobus, Acting Principal Legal Officer, Security Law Branch, Security and Critical Infrastructure Division

Ms Karen Bishop, Senior Legal Officer, Security Law Branch, Security and Critical Infrastructure Division

Mr Geoff Gray, Assistant Secretary, Criminal Law Branch

AUSTRAC

Mr Neil Jensen, Director

Mr Paul Ryan, Acting Deputy Director

Ms Liz Atkins, Deputy Director, AML Reform

Public Interest Advocacy Centre (Submission 81)

Ms Anne Mainsbridge, Senior Solicitor

Ms Jane Stratton, Policy Officer

Australian Lawyers for Human Rights (Submission 139)

Mr Simeon Beckett, President

Castan Centre for Human Rights Law (Submission 114)

Mr Ibrahim Abraham, Research Fellow

Gilbert and Tobin Centre of Public Law (Submission 80)

Dr Andrew Lynch, Director, Terrorism and Law Project

Dr Ben Saul, Director, Bill of Rights Project

Amnesty International Australia (Submission 141)

Mr Robert Toner SC

Ms Nicole Bieske, Board Member, Member of National Legal Team

Law Council of Australia (Submission 140)

Mr John North, President

Mr Peter Webb, Secretary-General

Ms Pradeepa Jayawardena, Policy Lawyer

Sydney, Thursday 17 November 2005

Australian Press Council (submission 143)

Professor Ken McKinnon, Chairman

Mr Jack Herman, Executive Secretary

Arts and Creative Industries of Australia (submission 153)

Mr Robert Connolly

Mr Chris Connolly, Visiting Fellow, Law Faculty, University of New South Wales (Submission 56)

Australian Bankers Association (submission 26)

Mr Tony Burke, Director, Tax and Security Issues

Mr David Bell, Chief Executive Officer

Association of Superannuation Funds Australia (submission 64)

Mr Brad Pragnell, Principal Policy Advisor

Australian Muslim Civil Rights Advocacy Network (submission 157)

Dr Waleed Kadous, Co-convenor

Ms Agnes Chong, Co-convenor

Australian Federation of Islamic Councils (no submission)

Dr Ameer Ali, President

NSW Council for Civil Liberties (submission 161)

Mr Cameron Murphy, President

Mr David Bernie, Vice President

Ms Pauline Wright, Vice President

Human Rights and Equal Opportunity Commission (submission 158)

Mr John von Doussa QC, President

Mr Craig Lenehan, Deputy Director, Legal Services

Australian Federal Police (submission 195)

Federal Agent John Lawler, Deputy Commissioner

Federal Agent Andrew Colvin, Chief of Staff

Mr Peter Whowell, Manager, Legislation Program

Australian Security Intelligence Organisation (no submission)

Mr Paul O'Sullivan, Director-General

Inspector-General of Intelligence and Security (submission 163)

Mr Ian Carnell, Inspector-General

Commonwealth Ombudsman (submission 163)

Professor John McMillan, Commonwealth Ombudsman

Mr Bret Walker SC (submission 194)

ACT Government

Chief Minister Jon Stanhope, Australian Capital Territory (Submission 156)

Mr Peter Garrison, Chief Solicitor, ACT Government Solicitor's Office

Dr Helen Watchirs, ACT Human Rights and Discrimination Commissioner (Submission 154)

Ms Elizabeth Kelly, Acting Chief Executive, ACT Department of Justice and Community Safety

Sydney, Friday 17 November 2005

Attorney-General's Department (Submission 290)

Mr Geoff McDonald, Assistant Secretary, Security Law Branch, Security and Critical Infrastructure Division

Ms Kirsten Kobus, Acting Principal Legal Officer, Security Law Branch, Security and Critical Infrastructure Division

Ms Karen Bishop, Senior Legal Officer, Security Law Branch, Security and Critical Infrastructure Division

Mr Geoff Gray, Assistant Secretary, Criminal Law Branch

APPENDIX 3

DETENTION SAFEGUARDS: SOME PROCEDURAL COMPARISONS

ASIO Act 1979 (Division 3 of Part III) Questioning and Detention Warrants	Anti-Terrorism Bill (No.2) 2005 (Schedule 4) Preventative Detention Orders
(a) Written statement of procedures issued before any warrants could be sought (s.34C (3A)). This is in addition to a general requirement for humane treatment of the subjects of a warrant (s.34J).	(b) Item 105.33 has the same general requirement for humane treatment, but nothing specific beyond that. Consideration should be given to including a similar statement of procedures requirement.
(a) Detailed explanation to subject of warrant by prescribed authority of rights and obligations, including the right to complain to Ombudsman and/or Inspector-General (s34E).	(b) Explanation to subject of order by police officer, including of right to make representations to a nominated senior AFP member or complain to Ombudsman (Items 105.19, 105.28 and 105.29). Some matters could be added to what must be explained (eg Item 105.51 (5) on right to appeal to the AAT, and Item 105.42 on limits on questioning).

(a) Contact with Ombudsman or Inspector-General – subject's rights preserved and must be provided with facilities to do so (s34F(9), 34NC and 34VAA(5)).	(b) The person being detained is entitled to contact the Ombudsman or a State or Territory police ombudsman where such a body exists (Item 105.36) (c) Section 22 of Complaints (AFP) Act 1981 gives detained persons who wish to complain to the Ombudsman, a right to have facilities to do so (Should this at least be a note to Item 105.36?).
(a) Subject's legal adviser has right to a copy of warrant (s34U(2A)). (b) ASIO must provide the IGIS with a copy of any draft request for a warrant given to the Attorney-General, any warrant issued, a copy of the video recordings which must be made, and a statement containing details of any seizure, taking into custody or detention or action taken in response to IGIS concerns (s.34Q).	(c) Copies of orders provided to subject and if requested their legal representative (Item 105.32). (d) A summary of grounds for order (but not including information likely to prejudice national security) must also be given to subject and if requested their legal representative (Item 105.32). (e) Suggest a copy of order and grounds for order must be provided to the Ombudsman, where subject does not have a legal representative.
(a) IGIS can be present at questioning and can raise a concern with the prescribed authority who must consider it (s.34 HAB, s.34 HA).	(b) Questioning by AFP only to extent necessary to give effect to order (Item 105.42); ASIO not to question (Item 105.42(2)) although can obtain a questioning and detention warrant (Item 105.25).

(a) Inspector-General must report on examinations when multiple detention warrants are issued (s.34QA). ASIO must report to Attorney-General on outcomes of each warrant (s.34P).	(b) Item 105.47 requires annual report by Attorney-General to Parliament. [Note: issue of whether the required contents of the report should be expanded eg orders voided by federal court or AAT.]
(a) With effect from 2/12/05, Inspector-General has right of access to any place being used for detention (new s.9B and 19B in IGIS Act).	(b) No equivalent, although a nominated senior AFP member must oversee exercise of powers under, and performance of obligations in relation to, orders (Item 105.19(5) – (9)). This could be expressed to include that conditions of detention meet standards (and perhaps that breaches should be advised to issuing authority and/or Ombudsman).
(a) General preservation of functions and powers of Ombudsman and Inspector-General (s.34T).	(b) General preservation of functions and powers of Ombudsman (Item 105.48).
(a) No access to AAT.	(b) Right of appeal to AAT on merits after order no longer in force, AAT can determine compensation payable (Item 105.51).
(a) Subject can seek a remedy from a federal court. No access to State/Territory courts while warrant in force (s.34X).	(b) Access to courts for remedies after order no longer in force. (Items 105.51 and 105.52).

1. (a) Attorney-General must consent to request for warrant (by Director-General of Security to Issuing Authority) (s.34C). (b) Attorney-General must be satisfied that several requirements are met (s.34C (3)).	1. (c) No similar requirement but these will be time critical situations. (d) Note that control orders (which will not be as time critical) do require consent of Attorney-General, although not satisfaction on the specific requirements akin to 11 (b) – see Item 104.2 – perhaps this should be added to control order provisions.

16 November 2005

This document was provided to the Committee by the Inspector General of Intelligence and Security during the Public Hearings.

APPENDIX 4

AUSTRALIAN FEDERAL POLICE

Answers to Questions on Notice

Senate Legal and Constitutional Legislation Committee
Inquiry into the provisions of the Anti-Terrorism Bill (No. 2) 2005

PUBLIC HEARING

THURSDAY, 17 NOVEMBER 2005

Questions on notice

Australian Federal Police

Question 1 (p.65, *Proof Hansard*)

Senator LUDWIG—And what is defined as a serious offence?

Federal Agent Colvin—A serious offence is defined by the legislation. I would have to consult the legislation to check, but I believe that 'indictable offence punishable by three years or more' is the normal definition for a serious offence.

Senator LUDWIG—Or two; it is one, I think, in some parts. So perhaps you could clarify that at some point.

Answer

This proposed section will rely on the definition of 'serious offence' and 'serious terrorism offence' as proposed in the Schedule 5 of the Bill (new definition under subsection 3C(1) of the *Crimes Act 1914*). That is

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.

serious terrorism offence means:

(a) a terrorism offence (other than offence against section 102.8 Division 104 or Division 105 of the *Criminal Code*); or

(b) an offence against a law of a State:

(i) that has a federal aspect; and

(ii) that has the characteristics of a terrorism offence (other than such an offence that has the characteristics of an offence against section 102.8, Division 104 or Division 105 of the *Criminal Code*); or

(c) an offence against a law of a Territory that has the characteristics of a terrorism offence (other than such an offence that has the characteristics of an offence against section 102.8, Division 104 or Division 105 of the *Criminal Code*).

Question 2 (p.65 Proof Hansard)

Senator LUDWIG—And the use of the notice to produce—it requires, what, an AFP officer, sworn or unsworn, to make out a statement? Does that statement have to be a sworn statement? **Mr Lawler**—As I understand it, it is a superintendent—

Federal Agent Colvin—That is correct. If the notice is produced in the case of a terrorism offence then the notice can be issued by a senior police officer of the AFP. If the notice is for a non-terrorism serious offence then we are required to go to a magistrate, in which case I believe the evidence would need to be extreme.

Mr Lawler—In a lot of instances there may not be the time to actually swear a search warrant, which, as you may be aware, is quite a lengthy procedure.

Answer

No the statement does not need to be sworn. This is consistent with other existing notice to produce powers, such as the power in the *Proceeds of Crime Act 2002*.

Note the AFP will be requesting that the last word in Federal Agent Colvin's statement in the proof Hansard on this point be amended to "sworn".

Question 3 (p.68, *Proof Hansard*)

Mr Lawler—…

Senator BRANDIS—Would you kindly take on notice, please, to search for and produce, if need be on a confidential basis, to the committee any minute or other record of a conversation in which your agency was advised by officers of the Attorney-General's Department that changes to the sedition laws were necessary for any of the purposes you have discussed with me in the last few minutes.

Answer

The AFP raised the current vulnerability in dealing with the inciting of terrorist violence in the community during the July-August 2005 review of the Commonwealth counter-terrorism legal framework undertaken at the request of the Government by the Commonwealth Counter-Terrorism Legal Working Group. The sedition offences proposed in the *Anti-Terrorism Bill (No 2) 2005* are the outcome of the Government's consideration of that review.

During the conduct of the review, the AFP was advised by the Attorney-General's Department that there is no offence currently available to address the situation with sufficient penalties where people from one group in the community may be indirectly encouraging terrorist

activity by urging violence against other groups in the community. That advice was given orally during meetings of that Working Group, in writing in the form of records of relevant meetings and in writing in the form of drafts of documents prepared for consideration by the Government. As these documents related directly to the preparation of options for consideration by the National Security Committee of Cabinet, in accordance with the *Government guidelines for official witnesses before Parliamentary committees and related matters - November 1989* it is not appropriate to release them to the Committee.

Question 4 (p.69, *Proof Hansard*)

Senator BRANDIS—…

In a supplementary submission received today—you may want to take this on notice, incidentally—the Human Rights and Equal Opportunity Commission have considered that example and responded in particular that there would be powers to deal with that person on the basis of that information alone, by issuing a warrant under the ASIO Act for questioning. That may be so, but what I would like you to tell the committee, please, from the Australian Federal Police's point of view is how more satisfactorily the threat posed by that example could be dealt with were you to have the additional powers anticipated by this bill, and what gaps there are in the existing suite of legislation, in particular the ASIO Act, that might inhibit dealing with that example. Would you take that on notice for us?

Mr Lawler—Thank you.

Answer

The person described in this scenario has made a private statement of intent that, depending on the information available to ASIO, the AFP and other law enforcement agencies may not amount to a threat to commit a terrorist act per s 100.1 of the *Criminal Code Act 1995 (Clth*).

While the person of interest may be dealt with using the existing ASIO questioning and detention regimes, these powers are not necessarily designed to intervene in these circumstances. Rather, the ASIO questioning and detention powers are intended as a tool for the gathering of intelligence when other available methods would not be effective.

The proposed preventative detention and control order powers offer the relevant authorities additional tools to defuse a threat and support an investigation into the person and any network that they were part of that could lead to the prosecution of the whole group and a greater level of protection to the community. This is particularly so where intelligence gathered on the individual indicates, for example, that the person:

- has received terrorist training in the period before it became an offence, but has not been active with other terrorist suspects since receiving that training; or

- has a history of violent offences and has recently undergone a rapid conversion to an extreme ideology in response to a personal tragedy which indicates their level of commitment to carrying out such an act may be high.

In regards to the proposed scenario, and particularly in light of the above circumstances, it is likely there would be reasonable grounds to suspect that a terrorist attack was imminent and therefore the proposed preventative detention order could be invoked given the making of the order would substantially assist in preventing the attack.

Similarly, a control order could be used in the circumstances to, for example, more effectively monitor the person's movements as well as prohibit the person from possessing certain articles that might be used in a terrorist act. A court would need to be satisfied that the making of the order would assist in preventing a terrorist act.

Question 5 (p.69, *Proof Hansard*)

Senator BRANDIS—

Lastly, going back to sedition—you might care to take this question on notice too—the Human Rights and Equal Opportunity Commission suggests that, if the law were to be amended to as per the bill, the defence in section 80.3 should be broadened so as to extend the expression which could be characterised as attempting to encourage discussion on matters of public interest if such expression falls within the proposed sections 80.27 or 80.28, and broadening the proposed section 80.3 to expressly provided a defence in respect to anything said or done in good faith in the performance, exhibition or distribution of artistic work or the course of any statement, publication, discussion or debate held for any genuine purpose or in making or publishing a fair and accurate report of a particular matter. I think you will understand the gist of it having heard it. You may wish to take the question on notice, but if you want to say anything you may respond immediately. My question is, given that you are an advocate of the sedition changes, would you have a problem if the defences were broadened in the two respects recommended by the Human Rights and Equal Opportunity Commission?

Mr Lawler—I will take that question on notice.

Senator BRANDIS—Thank you

Answer

The AFP does not have a position on the proposal by the Human Rights and Equal Opportunity Commission. The proposed sedition offence would require sufficient evidence to support the criminal standard of beyond a reasonable doubt and any prosecution would need the Attorney-General's consent to proceed. The conduct described as requiring a defence would be unlikely to meet the requirements of proof on the part of the prosecution beyond reasonable doubt that the person intentionally urged the use of force and violence. In the unlikely event that such a person was prosecuted, the good faith defence is currently broadly drafted and would appear to incorporate the defence proposed by the Human Rights and Equal Opportunity Commission.

Question 6 (p.71, *Proof Hansard*)

Senator MASON—Back to sedition: I do not think that I am exaggerating to say that over the last couple of days of hearings there has been concern at least—perhaps dissatisfaction—with those offences. I do not think I am gilding the lily to say that. Secondly, we also know that the Attorney-General is going to have a review of the sedition offences; he has announced that already. What we really need—and you just touched on this before in

response to questions from Senator Brandis—are some specifics with respect to how the new sedition offences are necessary to enhance your operational capacity to fight terrorism. We really need that because nearly all the evidence we have heard thus far, except from the Attorney-General's Department, has been that the new sedition offences have not or will not enhance law enforcement's capacity to fight terrorism. We are going to need from the AFP—and indeed from the department—some evidence that these new offences are required. It is important I say this, because I think it is a fair summary of what has happened over the last couple of days. We have not had a sedition offence charge since the late 1940s or whenever it was. We really need for you to give us that evidence, otherwise it is difficult for the committee to come to a recommendation other than that which the majority of submissions have come to.

Senator BRANDIS—That evidence has to be the conduct that is not caught by the current law.

Mr Lawler—The answer to your question—and I want to be brief here—is that it needs to be put back into the context of our prevention work. If we in a hypothetical situation are seeing, hearing or are aware of activity by people where they are inciting, where they are promulgating jihad—

Senator MASON—I understand that. I do not want to waste time. We need to be even more specific than that. We need to be very specific as to the particular conduct. Is that clear? I want to make that very clear.

CHAIR—Do you want Deputy Commission Lawler to take that on notice?

Senator MASON—If that is possible.

Answer

During the conduct of the July-August 2005 review of the Commonwealth counter-terrorism legal framework undertaken at the request of the Government by the Commonwealth Counter-Terrorism Legal Working Group, the AFP was advised by the Attorney-General's Department that there is no offence currently available to address the situation with sufficient penalties where people from one group in the community may be indirectly encouraging terrorist activity by urging violence against other groups in the community. That is, there is no clear offence in the Criminal Code for possessing, publishing, importing or selling publications, recruitment pamphlets and videos that advocate terrorism. Similarly, the provisions in the *Crimes Act 1914* prohibiting sedition, especially defining seditious intention and seditious words, may not adequately address such publications as their fault elements and defences are not suited to countering terrorism.

An emerging area of concern for the AFP is people in the community setting up small extremist group. For example, the leader of such a group may have broken away from a recognised mainstream group, and is urging their followers to take violent action in Australia in opposition to Australia's involvement in foreign conflicts. The leader is not directing the group as to the specific action they should take but is urging them to take violent action in the name of their extreme ideology. During the review of the counter-terrorism legal framework, the AFP was advised by the Attorney-General's Department that this situation is not covered by the existing offence in the Criminal Code, as this offence requires that a person must

intend that the offence incited be committed and that proof of this is proof of a connection to a terrorist act.

Question 7 (p.74, *Proof Hansard*)

Federal Agent Colvin—…

Senator STOTT DESPOJA—I suggest that it has not necessarily been individual senators who have often drawn that parallel. That has been presented a number of times in evidence. But I acknowledge your qualifications. As a supplementary to that question, I am not sure what the longest time is that it has taken, for example, to get an urgent interim order and whether or not you have examples that you could share with us in which it has taken too long or you envisage it would take too long. I am happy for that to be taken on notice.

Answer

Given the urgent operational circumstances that preventative detention would be limited to being used in, to prevent an imminent terrorist attack or preserve evidence of an attack, the AFP supports the process as set out in the Bill for initial and continued preventative detention as the appropriate way to balance judicial oversight with the operational requirements of acting to prevent an imminent attacks or respond to attacks that have occurred.

Initial preventative detention orders, as proposed, are necessary for the AFP to be able to quickly detain:

- suspected terrorists in transit to or at the likely targets of terrorist attack; or

- suspected terrorists at or near the site of the terrorist incident or who have fled some distance from that site.

Their detention would be time critical to enable police to locate and intercept their associates in order to prevent related planned attacks and collect evidence relevant to the potential attack that may otherwise be contaminated or destroyed.

In these emergency circumstances the AFP is concerned that for the initial period of detention, an authorisation approach of judicial authorisation and an urgent judicial authorisation would not provide the same certainty. As it is likely that authorisation will be required at any time of day or night, police will need to know quickly whether preventative detention is available in these circumstances. If it is not, police need to be able to develop alternative treatments for the impending threat.

Question 8 (p.74, *Proof Hansard*)

Senator STOTT DESPOJA—I suggest that it has not necessarily been individual senators who have often drawn that parallel. That has been presented a number of times in evidence. But I acknowledge your qualifications. As a supplementary to that question, I am not sure what the longest time is that it has taken, for example, to get an urgent interim order and whether or not you have examples that you could share with us in which it has taken too long

or you envisage it would take too long. I am happy for that to be taken on notice. But why not create an exception, thus having the rule and the basis of this legislation being a requirement that judicial authorisation is required for the purposes of a preventative detention order, and then have an exception for an extraordinary case where if it is—

Senator BRANDIS—As they do with control orders.

Senator STOTT DESPOJA—Thank you, Senator Brandis. Yes, as they do with control orders. Why not allow for that emergency exception?

Federal Agent Colvin—It is a good question. It is one we probably should refer to the department or at least confer with the department on before we answer. We can provide you with some scenarios, I believe, where we feel that the immediacy of the situation requires us to act without the added pressure of—

Senator STOTT DESPOJA—But it is not every time, is it?

Federal Agent Colvin—No. I think that is quite fair; it would not be on every occasion. Each occasion would be different.

Senator STOTT DESPOJA—Thank you very much for that.

Answer

The preventative detention provisions proposed in the Bill allow for the approval of an initial preventative detention order by a senior AFP officer for a period of up to 24 hours and any extension of that order as a continued preventative detention order for up to a total period of 48 hours to be by a judicial officer.

Given the urgent operational circumstances that preventative detention would be limited to being used in, to prevent an imminent terrorist attack or preserve evidence of an attack, the AFP supports the process as set out in the Bill for initial and continued preventative detention as the appropriate way to balance judicial oversight with the operational requirements of acting to prevent an imminent attacks or respond to attacks that have occurred.

Initial preventative detention orders, as proposed, are necessary for the AFP to be able to quickly detain:

- suspected terrorists in transit to or at the likely targets of terrorist attack; or
- suspected terrorists at or near the site of the terrorist incident or who have fled some distance from that site.

Their detention would be time critical to enable police to locate and intercept their associates in order to prevent related planned attacks and collect evidence relevant to the potential attack that may otherwise be contaminated or destroyed.

Question 9 (p.75, *Proof Hansard*)

Senator NETTLE—In the example that you described earlier around sedition, you had circumstances of incitement and the advice that you received from A-G's was that this was the way to go about it. Perhaps I am wrong, but that was my understanding of what you said. Could you take on notice for each of these additional powers: when did you request those particular additional powers? It may be that for some of them it is the same scenario as you just described for sedition. I am not expecting you to have all that here now so, if you do not, I am happy for you to take it on notice.

Mr Lawler—I think we will have difficulty identifying a date. But as I have explained and as the Director- General indicated, what occurred was there was an interdepartmental committee, a group of people who discussed the issues around the legislation—particularly in the wake of the bombings in London—to ensure that we had all the necessary mechanisms in place that we believed were required. It was in that much broader context that the legislation then took hold.

CHAIR—Whatever information you can provide the committee with in relation to Senator Nettle's question and your participation in that RDC would be helpful.

Mr Lawler—I will do that.

Answer

The AFP requested the powers proposed in Anti-*Terrorism Bill (No 2) 2005* during the July-August 2005 review of the Commonwealth counter-terrorism legal framework undertaken at the request of the Government by the Commonwealth Counter-Terrorism Legal Working Group.

The AFP has been having ongoing discussions with the Attorney-General's Department about the need for preventative detention; stop, question, search and seize powers; and notices to produce since late 2001. The AFP has also raised the utility of a notice to produce in a number of public inquiries during this period.

Discussions between the AFP and the AGD have occurred as part of the ongoing review of the Commonwealth counter-terrorism legal framework initiated by the Government in 2001. These proposals have been assessed, along with a range of other legislative proposals such as the terrorist offences in the Commonwealth Criminal Code, the establishment of an investigation period for terrorist offences in the *Crimes Act 1914*, and legislative support for the use of surveillance devices, against the terrorist environment as it has evolved since 2001 and prioritised in terms of the enhancement to operational capability that they would provide. Previously preventative detention and stop, question, search and seize powers, along with other proposals, have been recognised by the Government as requiring assessment over the longer term.

Question 10 (p.75, *Proof Hansard*)

Senator NETTLE—I want to ask about the sedition part of the legislation on advocating a terrorist act. We have had some discussion already in the committee about whether or not an organisation would be deemed an unlawful association if the comments of a member or a leader of an organisation praised the carrying out of a terrorist act. Do you have an idea of

how you intend to deem an organisation an unlawful association? Would it be based on the comments of one member of an organisation or would you require the leader of that organisation to say something or for a statement to be supported by that organisation? Can you give us an idea of how you might implement that part of the legislation?

Mr Lawler—It is very difficult to do so. One needs to know the circumstances of a particular event or activity and one needs to know it in intricate detail because facts will impact upon the circumstances and general presentation of what has occurred. So the answer is that it is very difficult to do so and I would not be able to.

Senator NETTLE—Perhaps I will give you an idea of why I am asking that question. There is a whole gamut. There is an organisation and the leader of an organisation, and the doctrine of that organisation is, 'We support position X.' That is perhaps one end of the spectrum. At the other end of the spectrum is a group of people from a particular church group who are having a meeting about self-determination movement in West Papua. They are making comments which may be seen as praising an organisation, parts of which are armed. In that circumstance, it might be just that particular group of people in that church. Would the entire church be deemed to be an unlawful association? To me there is a gamut or a range. I am trying to understand, in the piece of legislation that I will be asked to vote on in two weeks, what you intend. It is not in the legislation so I am asking you, as the people who would be implementing it, what you intend. That is the framework in which I am asking that question. You can take that on notice if you are not able to provide an answer now.

Mr Lawler—Yes, thank you.

The AFP understands that this question relates to the amendments proposed in Schedule 1 in relation to the listing of terrorist organisations, in particular the proposed introduction of advocating terrorist acts as a ground on which an organisation could be listed as a terrorist organisation.

On the facts of the situation given in this question it is difficult to see how the whole church could be specified as a terrorist organisation because it is unlikely that the test outlined in proposed section 102.1(2) would be satisfied.

Question 11 (p.76, *Proof Hansard*)

Senator NETTLE—Last week Mick Keelty was interviewed by Kerry O'Brien on the *7:30 Report*. He was asked the question: 'Does it'—referring to the recent raids—'demonstrate that current powers are adequate,' to which he answered, 'Well, I think they are.' That seems to contradict the evidence that you have given to this committee today. Can I ask you to take on notice an explanation for the discrepancy between that comment last week made by Mick Keelty and the comments you have made today?

Mr Lawler—I would like to respond to that. What I would like to know is the context in which the commissioner said that. I do not believe that the commissioner would have ever said or intended to say that we have all of the legislative tools required for the AFP. I know for a fact that he would not have said that.

CHAIR—The context is important. I understand that you will take that on notice.

Senator NETTLE—Yes, that is why I have put it on notice. Thank you.

In answering this question, the AFP will refer to the transcript of this interview available on the 7.30 Report's website.

This comment occurred in the concluding part of the interview with Commissioner Keelty:

> KERRY O'BRIEN: Very briefly, Commissioner, there's been a lot of talk about shoot-to-kill powers in recent weeks, but does last night's operation and in particular the shoot-out between one suspect and police, demonstrate that police already have adequate powers to use firearms in appropriate circumstances? Without going to that individual case?
>
> MICK KEELTY: Well, without going to the individual case, but I will say one thing about that individual case of the operation today and this is a real fact, I know it is. The dangers that are presented to police officers and law enforcement officers and indeed the ASIO officers in conduct of operations is real and is present and we've not exaggerated that.
>
> KERRY O'BRIEN: No.
>
> MICK KEELTY: And police are entitled to protect the community. An innocent bystander can be shot as a result of shots been fired in a confrontation such as that, but of course the police officers are entitled to defend themselves as well and, look, I can assure you, Kerry, that police officers are trained regularly. They have to re-train and qualify for that sort of use of force and no police officer looks forward to having to draw their weapon from their holster, I can assure you of that.
>
> KERRY O'BRIEN: I am sure not, but does it demonstrate that current powers are adequate?
>
> MICK KEELTY: Well, I think they are and I think the issue about the proposed bill was an issue of transparency and I commend transparency when we've got such difficult issues to work through with the community.
>
> KERRY O'BRIEN: Mick Keelty, thank you very much for talking with us tonight.
>
> MICK KEELTY: My pleasure, Kerry.

As is evident from the context of that comment, Mr O'Brien and the Commissioner were discussing the public debate over the use of force provisions proposed in the Anti-Terrorism Bill (No 2) 2005, including their characterisation by some commentators as shoot to kill powers. The Commissioner's comment was not about the adequacy of all powers available to police to investigate and prevent terrorism.

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

QUESTION PLACED ON NOTICE BY SENATORS – FRIDAY, 18 NOVEMBER.

Ludwig (Notice to produce)

1 When were these powers first requested by the AFP to be included in legislation?

The AFP requested the notice to produce powers proposed in Anti-*Terrorism Bill (No 2) 2005* during the July-August 2005 review of the Commonwealth counter-terrorism legal framework undertaken at the request of the Government by the Commonwealth Counter-Terrorism Legal Working Group.

The AFP has been having ongoing discussions with the Attorney-General's Department about the need for a range of powers including notices to produce since late 2001. The AFP has also raised the utility of a notice to produce in a number of public inquiries during this period.

2 Why is the AFP's power to obtain information and documents drafted so widely? Why is it not drafted to contain a closer nexus with the commission of a terrorism offence or other serious crime?

The notice to produce powers for serious terrorism offences and serious offences are modelled on the provisions in other Commonwealth legislation such as the *Proceeds of Crimes Act 2002*.

The AFP believes that an appropriate nexus between the relevant offences and the power has been provided by the drafter through proposed sections 3ZQN (1) and 3ZQO (1) which requires the documents requested to be relevant to and of assistance to the investigation of the relevant offences.

3 In what circumstances is it envisaged that the AFP will need to issue a notice to compel the production of information and documents?

The AFP believes that it will need to use the proposed notices to produce to facilitate essential and basic inquiries related to the investigation of terrorist and other serious offences such as confirming the existence of an account, account holder details (including residential address), account history and payment details. The British police have such a power which was invaluable during the response to the London bombings to identify the suspected terrorists and verify their movements and associations.

The following two scenarios drawn from AFP operational experience and its understanding of the terrorist environment may assist in understanding when the notice to produce powers might be used by the AFP to undertake such inquiries.

Scenario 1

The AFP and other agencies receive information from Interpol that a suspected terrorist is en route to Australia.

During the course of the flight which that suspect is on the AFP needs to confirm the information and assess what would be the appropriate response such as to place the person under surveillance upon arrival or even refuse the plane the right to land in Australia.

A relevant source of information for the AFP would be travel agents who may have been involved in booking that person's travel to Australia.

The notice to produce as proposed in the Bill would allow the AFP to access this information quickly while providing appropriate assurances to the travel agent as to the lawfulness of releasing this information to the AFP

Scenario 2

A number of terrorist attacks in Australia have been prevented as a result of information received in a 24-hour period.

A number of persons have been arrested, however, the extent and location of their network is uncertain.

Expeditious AFP access to information from utility providers, real estate agents and bank accounts is able to provide information that assists the AFP to identify in a timely manner the residences of persons arrested, other persons at those properties, materials recently purchased and recent suburbs visited as well as identifying associates through telephone records.

4 How do you respond to arguments that the AFP's power to obtain information and documents will prevent journalists from doing their jobs by, for example, forcing them to reveal the identity of a confidential source? (Fairfax, Sub 88, p. 4)

The AFP does not believe that the situation contemplated by Fairfax in their submission will occur. Although the power as proposed does relate to any person (sections 3ZQN and 3ZQO) and could relate to documents otherwise protected by legal professional privilege or other duties (section 3ZQR), section 3ZQP sets out the matters to which the documents must relate. As these documents are all, in one way or another, proprietary documents related to transactions and account holder details that the AFP would be able to access directly from the originating organisation, there would be no need for the AFP to seek that information from anyone else than that organisation. In the case of serious offences, it is unlikely that a Magistrate would make such a notice out in relation to a journalist.

5 How do you respond to arguments that the AFP (and ASIO's) power to obtain information and documents will compromise freedom of speech and the right to privacy?

The AFP believes the draft provisions ensure that information is only sought in limited circumstances and that the Bill does not provide greater access than is already available under the information disclosure provisions of the *Privacy Act 1988* or the search warrant regime established by the *Crimes Act 1914* . What the proposed notice to produce system will do is establish an appropriate mechanism for law enforcement to access information about which the information holders may be unsure about their lawful ability to release.

6 Why is it appropriate for the AFP to be given powers to effectively circumvent the usual procedures for obtaining evidence under a search warrant (including the independent safeguard of an issuing magistrate) in relation to terrorism offences?
The notices to produce proposed in the Bill will not circumvent the use of search warrants.

The AFP has found in the course of investigating a range of serious crimes, including terrorist offences, that businesses are often anxious about their moral and legal duties of confidentiality to clients despite their ability to disclose information lawfully under the *Privacy Act 1988*. As a result some businesses feel the need to have specific authorisation such as a search warrant to release information that they can otherwise lawfully release.

The AFP believes that it is inappropriate to use search warrants in this way as search warrants are designed to effect the physical search of premises, not to facilitate the lawful provision of information to the AFP by organisations, who are effectively bystanders to the commission of any serious offences but who have factual details of relevance to the investigation.

6A Why aren't there specific safeguards contained in the Bill to protect privacy and liberty in this context? (see Gilbert & Tobin, Sub 80, p. 15)

The safeguards are that where the notice is to do with a terrorism offence, it may only be authorised by a senior AFP officer (see item 1 of Schedule 6). If it is for a serious non-terrorism offence, it may only be authorised by a Federal Magistrate. The authorisation requires careful specification of the documentation that is sought and there are restrictions on admissibility (s.3ZQR). In the event of there being a breach of privacy or an undue infringement on a person's liberty, the aggrieved person may lodge a complaint with the Privacy Commissioner or the Ombudsman (who examines complaints against the AFP).

7 Why has the notice to produce scheme been extended to the investigation of other serious offences (new section 3ZQO of the Crimes Act)?

(a) Why is it appropriate to extend special terrorism powers to the investigation of 'ordinary' crime in such a way?
(b) Why have non-terrorism offences been included in a piece of legislation designed to deal specifically with, and provide an exceptional response to, the threat of terrorism?
(c) How do you respond to arguments that this manipulates exceptional powers, significantly undermines ordinary criminal procedure, and constitutes significant intrusion of privacy and liberty? (see Gilbert & Tobin, Sub 80, pp 15-16; Fairfax, Sub 88, p. 4)

The AFP believes that notices to produce are just as essential for the investigation of terrorist offence as for all serious criminal offences, particularly as other serious offences can be related to terrorist activity. The AFP does not consider notices to produce to be ‘special terrorism powers’, they are instead a power that the Parliament has made previously available to a range of law enforcement and regulatory agencies in a form suitable to their enforcement or regulatory role. Including both powers in the one Bill recognises this. It should be noted that other Australian Government agencies such as the Australian Securities and Investment Commission and the Australian Crime Commission have notice to produce powers. The AFP currently has this power in relation to proceeds of crime under the *Proceeds of Crime Act 2002*.

As the Bill proposes a separate issuing process for notices to produce for serious terrorist offences and serious non terrorist offences, the latter requiring the AFP applying for such notices from a Magistrate and a different response period for the recipient of the notice, the AFP does not believe that including both powers in the one Bill or making this power available for the investigation of serious terrorist and serious non-terrorist offences significantly undermines ordinary criminal procedure or significantly intrudes on privacy and liberty.

8 New section 3ZQR abrogates the protection of legal professional privilege for a person required to produce a document under new section 3ZQN and 3ZQO.

(a) Why is this appropriate? Are there circumstances where it might it not be appropriate?
(b) Does the abrogation unduly trespass on the rights of an affected person? (see Gilbert & Tobin, Sub 80, p. 15)

The proposed legislation does not abrogate legal professional privilege. Indeed, subsection 3ZQR(4) preserves legal professional privilege in the extremely unlikely event that it would be relevant to the class of documents covered by the procedure (s.3ZQP). The documents consist of travel details and the like.

9 Please provide details of the current size of the AFP? If possible, please break this down into the number of:

- **sworn officers, unsworn officers;**
- **full time / part time / non-ongoing employees;**
- **outputs and /or functional divisions.**

If possible, please provide this information for the last five years.

What is the current turnover of staff among each of the above-mentioned categories or divisions?

The following data is provided in relation to staffing demographics of the Australian Federal Police.

The following tables shows AFP staff numbers, as at the end of each financial year since 30 June, 2001.

Sworn and Unsworn Officers

	Total Staff	AFP Members/Sworn	AFP Staff/Unsworn
17/11/05	3738	2355	1383
2004/05	3601	2310	1291
2003/04	3480	2312	1168
2002/03	3496	2297	1199
2001/02	3051	2043	1008
2000/01	2851	2032	819

	Total Staff (PS)	PS Officers/Sworn	PS Staff/Unsworn
17/11/05	1396	1222	174
2004/05	1389	1178	211
2003/04	1327	1138	188
2002/03	1264	1087	177
2001/02	1023	920	103
2000/01	682	N/A	N/A

Full time and Part time Employees

The AFP engages permanent and non-ongoing full time staff; these staff are shown in the "Full Time" count.

	Total Staff	AFP members Full time	AFP members Part time
17/11/05	3738	3569	169
2004/05	3601	3435	166
2003/04	3480	3322	158
2002/03	3496	3362	134
2001/02	3051	2905	146
2000/01	2851	2720	131

	Total Staff (PS)	PS members Full time	PS members Part time
17/11/05	1396	1375	21
2004/05	1389	1366	23
2003/04	1327	1308	19
2002/03	1267	1247	20
2001/02	1023	1013	10
2000/01	682	665	17

Permanent and Non Ongoing Employees

The AFP engages permanent part time staff; these staff are shown in the "Permanent" count.

	Total Staff	AFP members Permanent	AFP members Non Ongoing
17/11/05	3738	3591	147
2004/05	3601	3452	149
2003/04	3480	3379	101
2002/03	3496	3393	103
2001/02	3051	2923	128
2000/01	2851	2750	101

	Total Staff (PS)	PS members Permanent	PS members Non Ongoing
17/11/05	1396	1385	11
2004/05	1389	1352	37
2003/04	1327	1229	98
2002/03	1267	1120	147
2001/02	1023	925	98
2000/01	682	665	17

Staff by Functional Division

	Total Staff	Deputy Commissioner	ACT Policing	Support and Corporate	Chief of Staff	PS
17/11/05	5134	1972	802	856	108	1396
2004/05	4990	1898	767	814	122	1389
2003/04	4807	1733	791	625	331	1327
2002/03	4763	2071	774	587	64	1267
2001/02	4074	1621	764	666	-	1023
2000/01	3533	1571	710	570	-	682

Note : The above table reflects actual allocations at the specific points in time. The AFP has undertaken a number of structural changes since 2001, and the fluctuations of numbers in each portfolio is a consequence of separation, recruitment, mobility and structural arrangements. For example, Technical services (close operational support) moved from the Deputy Commissioner portfolio to the Support and Corporate portfolio in 2003.

AFP Separation Rates

	Total Rate	Deputy Commissioner	ACT Policing	Support and Corporate	Chief of Staff	PS
17/11/05	8.10%	4.70%	6.90%	7.40%	12.30%	13.69%
2004/05	7.13%	4.60%	8.20%	6.40%	7.70%	10.43%
2003/04	5.70%	3.60%	5.00%	6.7%	9.80%	9.37%
2002/03	5.12%	n/a	n/a	n/a	n/a	
2001/02	6.33%	n/a	n/a	n/a	n/a	
2000/01	8.83%	n/a	n/a	n/a	n/a	

Question 10 –

10 How many new employees – broken down by the above-mentioned categories or divisions – have joined the AFP in the preceding five years?

From July 2001 to September 2005, the AFP recruited 3617 staff, of which 642 were police officer recruits brought in through the AFP Base Police or Lateral Police recruit programs.

AFP Recruitment

	Total Staff	Deputy Commissioner	ACT Policing	Support and Corporate	Chief of Staff	PS
2005/06	392	88	49	88	5	81
2004/05	783	97	105	131	20	215
2003/04	579	27	50	68	10	212
2002/03	1423	221	73	308	15	403
2001/02	440	107	69	251	13	

Note : AFP recruits are NOT shown against the operational areas of their initial deployment. AFP recruits are required to undertake a lengthy recruitment course prior to their attestation, and the recruit numbers are reflected in the actual training areas.

11 Do you have any areas within the AFP where allocated budgeted amounts have not been expended within the last financial year and the out years?
If so,

(a) how much in each area and over which years?
(b) What was the reason(s) for the unexpended amounts?
(c) Is it intended that these monies, if any, will be reallocated to other areas (if so, where?) or held or carried over for that particular budgeted amount?

Yes. The AFP reported a 2004-05 end of year surplus of $24.0m. The surplus was attributed to the following areas:

- $12m for the International Deployment Group (IDG). The IDG surplus was post the return of $135m revenue to the Government Budget under the current conditions of returning unspent IDG funds. The remaining surplus for IDG of $12m was retained to ensure there was a sufficient buffer for unexpected end of year adjustments. Any uncommitted funds out of this surplus will be reviewed with the Department of Finance as part of the ongoing management of IDG funding.

- $12.0m for other AFP and AFP Protective Services activities. The majority of this underspend is associated with projects which are programmed to be spent over the next 18 months. Internal expense budgets allocated to AFP business areas, were either on or over budget for all areas except for the International Deployment Group (IDG) and AFP Protective Services.

Crossin

12 What additional resources and funding has the AFP been allocated to cover the additional duties and responsibilities imposed by or because of the Bill? Please provide a breakdown of all additional resources that have been allocated to the AFP showing: additional staff; additional equipment (specify); additional training; and any other resources (specify). When are these resources and funding due to be provided?

No additional resources have been provided to the AFP to implement the measures proposed in the Bill. The AFP is currently scoping the potential implementation costs of administering control orders and preventative detention and if additional resources are required will make representations to the Government in the course of its normal Budget processes.

13 Schedule 4. Item 12 Regarding tracking devices, please advise:

(a) the cost of an individual tracking device used to monitor a person under these or similar provisions;
(b) the number of tracking devices that the AFP have at the moment;
(c) the number of tracking devices that the AFP intend to procure once the Bill is enacted and commenced;
(d) how reliable are the tracking devices (how often do they break down or send a faulty or incorrect signal);
(e) the number of staff or officers it takes to monitor a person on a tracking device; and
(f) whether the AFP will require additional staff as a result of the increased use of tracking devices.

The AFP has established a small team to create a framework for the use of control orders. The AFP does not currently have technology appropriate to perform the tracking contemplated by the administration of control orders. This team will scope for the consideration of AFP management and the Government the number of devices required, the most appropriate tracking device, staffing requirements for the administration of control orders and whether this can be met within existing resources. The Government will consider the need for any additional resources for the AFP as part of its normal Budget processes.

14 What procedures does the AFP have in place for the use and request of tracking devices?

The small team established within the AFP to establish the control order framework will develop appropriate procedures.

15 If the AFP does not have these procedures in place, when are they expecting to have these procedures in place?

The AFP intends to have these procedures in place as soon as practicable, depending on the passage of the legislation.

16 Is the AFP working with other agencies, stakeholders or interest groups to develop the procedures? If so, which ones? If not, why not?

The AFP has had preliminary discussions with, and will consult further with, the Australian Security Intelligence Organisation, the Attorney-General's Department, the Commonwealth Director of Public Prosecutions and State and Territory Police.

17 What procedures does the AFP have in place for the use and request of control orders?

The AFP has established a small team to create a framework for the use of control orders. However, the procedures to be put in place will depend on the final form of the legislation. At present, the AFP is assessing how to provide national consistent oversight of control orders, operational support for the application for and serving of control orders and monitoring control orders, and coordination with the Australian Security Intelligence Organisation, State and Territory police services and other agencies.

18 If the AFP does not have these procedures in place, when are they expecting to have these procedures in place?

The AFP intends to have these procedures in place as soon as practicable, depending on the passage of the legislation.

19 Is the AFP working with other agencies, stakeholders or interest groups to develop the procedures? If so, which ones? If not, why not?

The AFP is currently developing a communication and consultation strategy to develop the procedures. It intends to work closely with all state and territory police services and with relevant Commonwealth departments and agencies, including the Attorney-General's Department, the Commonwealth Director of Public Prosecution, and ASIO.

APPENDIX 5

AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION

Answers to Questions on Notice

Senate Legal and Constitutional Legislation Committee
Inquiry into the provisions of the Anti-Terrorism Bill (No. 2) 2005

PUBLIC HEARING

THURSDAY, 17 NOVEMBER 2005

Questions on notice

Australian Security Intelligence Organisation

Question 1 (p.61, *Proof Hansard*)

Senator NETTLE—I presume you asked for those three additional powers.

Mr O'Sullivan—Yes.

Senator NETTLE—When did you ask for those?

Mr O'Sullivan—During the process I described to Senator Brandis.

Senator NETTLE—Can you remind me what the date of that was?

Mr O'Sullivan—I do not have a specific date, but it was after the government decided to consider whether it would strengthen the framework it set up under the departmental committee, and as part of that process we made those suggestions.

Senator NETTLE—Can you take that on notice and come back to us with a date?

Mr O'Sullivan—I can, but I do not know that there was a specific date. We can tell you the date when it was finally put in formal terms.

Senator NETTLE—That would be helpful, if you could supply that.

Mr O'Sullivan—Sure.

Answer: *These amendments were first raised with the Attorney-General's Department in July 2005 when it was consolidating proposals for new legislation following the London bombings. ASIO outlined the proposals in formal terms on 27 July 2005.*

Question 2 (p.63, *Proof Hansard*)

Senator LUDWIG—Is the number of warrants that you have sought available in your annual report?

Mr O'Sullivan—Yes, it is in the annual report.

Senator LUDWIG—Is the annual report available?

Mr O'Sullivan—Yes, it is.

Senator LUDWIG—Does it also indicate multiple warrants that have been sought for the same or similar issue?

Mr O'Sullivan—I would have to check on what is available. I will take it on notice.

Senator LUDWIG—What I am trying to establish is whether or not a warrant has been sought for a particular reason, you have not had sufficient time to undertake the work that you might otherwise have wanted to undertake during that warrant and that has necessitated a second warrant being requested because of the expiration of the time, which might provide a reason for why you require a tripling of the time.

Mr O'Sullivan—I see. The short answer to your question is: yes, it is the case. I do not know whether this information is available in the annual report or not, but in any case that expiry of warrants has led to the renewal of warrants which have then been renewed again and so forth. So there is no question that there has been this process of administrative extension.

Senator LUDWIG—If that information is available to the committee, it might be helpful in explaining the tripling of the time limit for the warrants.

Mr O'Sullivan—I will take that on notice.

Answer: *Details of the number of warrants sought by ASIO are reported in ASIO's classified Annual Report. Copies of this report are provided to the National Security Committee of Cabinet. A copy is also made available to the Leader of the Opposition under section 94 (2) of the ASIO Act.*

ASIO's unclassified Report to Parliament 2004-05 (page 40) notes that 'warrants are issued for specified limited time periods. At the expiry of each warrant ASIO must report to the Attorney-General on the extent to which the operation helped ASIO carry out its functions. The Inspector-General of Intelligence and Security has access to all warrant material and regularly monitors the process.

In 2004-05 the Attorney-General approved all warrant requests submitted to him.'

Under section 94 (1A) of the ASIO Act ASIO is required to report publicly on the number of questioning and detention warrants it sought and obtained. Details of other warrants sought and obtained by ASIO are not made publicly available for reasons of national security.

In terms of the extension of the duration of the warrants the Committee may wish to note the following:

Search Warrants: The amendments extend the maximum period for which a search warrant can be in force from 28 days to 90 days.

- *This will reduce the need for fresh warrants to be sought in unavoidable situations where it has not been practicable or possible to execute the warrant within 28 days.*
- *It is important to note that, as is currently the case, the Minister will continue to be able to evoke the warrant before the period has expired, and the Director-General will continue to be able to cease action under the warrant to be discontinued (under section 30) if the intelligence case changes.*

Inspection of postal and delivery service articles warrants: The amendments extend the maximum period for which inspection of postal articles warrants and inspection of delivery service articles warrants can be in force from 90 days to six months.

- *The extension of these periods to six months will harmonise these warrant periods with the time periods of other special power warrants, such as those for listening devices and telecommunications interception warrants.*
- *It is important to note that, as is currently the case, the Minister will continue to be able to revoke the warrants before the period has expired, and the Director-General will continue to be able to cause action under the warrants to be discontinued (under section 30) if the intelligence case changes.*

Foreign intelligence gathering warrant: The amendments extend the maximum time periods for foreign intelligence gathering warrants under section 27A so that the periods are consistent with those applying to the relevant activity.

- *The period for which search warrants are valid is extended from 28 days to 90 days, and the period for which inspection of postal and delivery service articles warrants are valid from 90 days to six months.*
- *Gathering information for foreign intelligence gathering warrants under section 27A is linked to the time period specified for activities available to ASIO under these other types of warrants.*
- *Accordingly, the amendments extend the time period for search activities conducted under foreign intelligence warrants to 90 days, and extend the time period for postal and delivery service article inspection activities to six months, so that they are consistent with the periods those types of warrants would be valid for.*

Question 3 (p.64, *Proof Hansard*)

Legal Adviser—That is right. The intention is that the items can only be withheld for a longer period than the time needed to inspect and examine if there is a security reason for holding onto them.

Senator LUDWIG—Could you have a look at it to see whether the alternative is not returning the item at all? It is reasonably open from the reading of that section. If that is not the intention, could you have a look at whether or not it does require an amendment for it to be clarified?

Legal Adviser—That is perhaps an issue that we can take up with the Attorney-General's Department. That is not what is intended.

CHAIR—Just to clarify—are you reading section 4(24) in schedule 10, Senator Ludwig?

Senator LUDWIG—Yes.

Answer: *As indicated to Senator Ludwig, ASIO has discussed this issue with the Attorney-General's Department. The Department considers that the amendment would only authorise ASIO to retain an item removed under a search warrant, beyond the period referred to in sections 25(4)(d) and 25(4A)(c), if the return of the item would be prejudicial to security. ASIO would be required to return the item when it was no longer the case that returning the item would be prejudicial to security.*

APPENDIX 6

ATTORNEY-GENERAL'S DEPARTMENT

Answers to Questions on Notice

Australian Government
Attorney-General's Department

Security and Critical
Infrastructure Division

05/18041

24 November 2005

Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600
By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Inquiry into the provisions of the Anti-Terrorism Bill (No. 2) 2005 – Attorney-General's Department Submission No. 3

Officers from the Attorney-General's Department appeared before the Committee on Monday 14 and Friday 18 November 2005. During the course of questioning on 18 November, Senators asked officers to take further questions on notice.

To assist the Committee in its inquiry into the Bill, the Attorney-General's Department provides the attached responses in relation to the further questions on notice.

The action officers for this matter are Karen Bishop who can be contacted on 02 6250 6926 and Kirsten Kobus who can be contacted on 02 6250 5433.

Yours sincerely

Geoff McDonald
Assistant Secretary
Security Law Branch

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Questions taken on notice
18 Nov 2005

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

QoN No.	Senator	Witness	Hansard Page	Question
1	Stott-Despoja	McDonald	3	**Senator STOTT DESPOJA**—Mr McDonald, I am trying to work out if you owe me a document. Looking at the *Hansard* from Monday—the exchange we had in relation to these matters and the advice from the Office of International Law—I am wondering if you are going to give us any written advice. **Mr McDonald**—That is entirely up to you. If you want to work from what I have just given you, that is fine. If you would like us to reduce our position on this into writing, we can do that too in our supplementary submission. **Senator STOTT DESPOJA**—I am not talking so much about advice that you can give the committee—and I note in your opening comments on Monday that you undertook to do that, and to all intents and purposes you have done that now—but wondering if there is any chance that this committee can see the advice from the Office of International Law that was provided to government in ensuring that we complied with the international conventions. **Mr McDonald**—I see. Do you mean something that was akin to the constitutional law advice? **Senator STOTT DESPOJA**—Yes. **Mr McDonald**—I think the policy on that is much the same as with the constitutional law advice. However, you will find, as did the PJC on ASIO, ASIS and DSD when we did our written submission to them, that we have provided pretty comprehensive assistance to you in terms of touching on the issues. **Senator STOTT DESPOJA**—Unfortunately, you will not be providing that advice to me because there are no cross-party members represented on that Parliamentary Joint Committee, but I want to know what that advice is. Is it secret? **Mr McDonald**—What I am getting at is that I will provide to this committee some written material which should assist you. It will not consist of a copy of the advice provided to government, but it will be some written material which can assist you and which reflects some of the sorts of things that I was talking about just a few minutes ago.

Please see response to Human Rights Obligations at pages 1 to 6 of Attachment A to Attorney-General's Department Submission Number 2 of 22 November 2005.

2	**Nettle**	**McDonald**	**6**	**Senator NETTLE**—Has the government received advice that the definition the government uses for 'national security' complies with the terminology that the ICCPR uses? **Mr McDonald**—From the context of my discussions with the Office of International Law, the answer is yes. However, what I will do in our written submission is give you an exact answer. **Senator NETTLE**—Can I check: an exact answer to which question? **Mr McDonald**—Your question was: does the government's definition of 'national security' line up with the references to security or threat to the nation? **Senator NETTLE**—'An emergency which threatens the life of the nation'. **Mr McDonald**—Based on the context of my discussions with the Office of International Law, I think the answer to that is absolutely yes. But I have not specifically asked them that question, so what I will do is to provide you with an exact answer.

A number of rights under the International Covenant on Civil and Political Rights may be restricted on the basis of national security. The Government is satisfied that, to the extent that any rights are restricted by the Bill, their restriction is justified on the basis of national security and, accordingly, is permitted under the ICCPR. The terminology "emergency which threatens the life of the nation" is contained in article 4 of the ICCPR, which allows States to derogate from their ICCPR obligations in certain circumstances. The Government has not derogated from its ICCPR obligations. It is not necessary for there to exist an "emergency which threatens the life of the nation" in order to justify the restriction of certain ICCPR rights on the basis of national security. The United Nations Human Rights Committee has stated that: "Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant".

3	**Nettle**	**McDonald**	**6**	**Senator NETTLE**—Have the government notified the United Nations that they intend to derogate from the ICCPR? The terminology we are talking about is the justification you can provide for derogation from our responsibilities. Have the government notified the UN that that Australia intends to derogate from the ICCPR? **Mr McDonald**—My understanding is that we do not need to. I can talk to the Office of International Law about whether there is anything I need to know about there, but I think the answer is pretty clearly the view that we do not need to. **Senator NETTLE**—I asked the question to begin with about whether or not the government's definition of 'national security' lined up because I listened to your opening statement and you seemed to be using the term 'national security' to justify what is in the bill. That is why— **Mr McDonald**—I am very happy to do that. **Senator NETTLE**—I ask that point. It would be helpful to the committee to get an answer about whether or not the government has notified the UN that they intend to derogate from the ICCPR on the basis of the definition that you have about what an emergency threatening the life of the nation is in Australia. **Mr McDonald**—What I am saying there is that I think we are talking about the same thing and therefore there is nothing for us to be derogating from the ICCPR about. But, as with all things, I will be very careful and ensure that you have a comprehensive written response on that point. But my understanding is that, when we are talking about national security, we are talking about the same thing.

The Government is not derogating from any obligations under the ICCPR and so has not notified the United Nations to that effect. The distinction between the restriction of rights on the basis of national security and the derogation from obligations in time of public emergency that threatens the life of the nation is explained more fully in the answer to question 2.

4	**Crossin**	**McDonald**	**10**	**Senator CROSSIN**—On 14 October Jon Stanhope posted on his web site a draft bill he had been sent. What version of the bill did he post on his web site? Was it about version 21 or 22? **Mr McDonald**—It was interesting. The Prime Minister wrote to them around 7 October with a draft of the bill— **Senator CROSSIN**—Do you know what number version that was? **Mr McDonald**—I cannot remember what number. I might just say that a lot of silliness— **Senator CROSSIN**—Can you take that on notice for me? **Mr McDonald**—I can take that on notice, but it is not really that important. If you change one word in the bill, it becomes another version. **Senator CROSSIN**—It is important for me. I am trying to track something here. So can you tell me what version of the bill was sent to the states and territories when they first got it? I am assuming it was either immediately before or the day of 14 October. **Mr McDonald**—No, it was about a week earlier. He had it for over a week before he did that. **Senator CROSSIN**—I would be interested to know what version it was— **Mr McDonald**—In fact, the version— **Senator CROSSIN**—or what number the version was that you sent him. **Mr McDonald**—Yes, okay. It is pretty easy though—it has a little number on the bottom of it.

The version that was placed on the website by Jon Stanhope was version 28 of 7 October 2005. This version was sent to States and Territories on 7 October 2005.

5	**Brandis**	**McDonald**	**22**	**Senator BRANDIS**—Can you reassure me, Mr McDonald, that there is a consequential amendment to the existing section 100.1(3)(a) which excludes advocacy from what may be capable of being a terrorist act, so as to accommodate the substantive change proposed by item 9? **Mr McDonald**—You are referring to how you cannot show— **Senator BRANDIS**—The definition of a terrorist act means it has to be within (2) but outside (3), but (3) includes 'advocacy'. So that scheme is not going to work with the proposed new amendment unless there is a consequential amendment— **Mr McDonald**—I see what you are getting at. **Senator BRANDIS**—to section 100.1(3)(a) of the Criminal Code. Is that done by this bill? **Mr McDonald**—The amendment that you suggested may require consequentials, so— **Senator BRANDIS**—No, but that is not arising out of my proposed amendment; this is arising out of a whole scheme of item 9 in schedule 1, the proposed definition of 'advocates'. Do you see what I mean? You cannot commit a terrorist act unless you do one of the things in subsection (2), as long as they are not also one of the things in subsection (3). And one of the things in subsection (3) which eliminates it being classified as a terrorist act is advocacy. So is there a consequential amendment? **Mr McDonald**—No. **Senator BRANDIS**—Well, there should be. **Mr McDonald**—The exemption of advocacy there only relates to non-violent advocacy. What we are talking about here is terrorist acts. All that does is take out the non-violent stuff. We had this discussion before. **Senator BRANDIS**—I don't think that is right, Mr McDonald. **CHAIR**—Mr McDonald, Senator Brandis has an extant concern on this matter. Would you mind taking that on notice and coming back to the committee on it? **Mr McDonald**—Yes. **CHAIR**—Thank you. **Senator BRANDIS**—If it is not a controversial issue, I would have thought that, out of abundant caution, 100.1(3)(a) should be amended with words like 'provided that it is not otherwise governed by the new clause'. **CHAIR**—Or, if not, would you come back to us with why not? **Mr McDonald**—Okay.

The definition of "terrorist act" at section 100.1 of the Criminal Code, excludes the non-violent actions of advocacy, protest, dissent or industrial action from being a terrorist act. In order for advocacy to be excluded it must not be intended:

(i) to cause serious harm that is physical harm to a person; or
(ii) to cause a person's death; or
(iii) to endanger the life of a person, other than the person taking the action; or

(iv) to create a serious risk to the health or safety of the public or a section of the public.

That definition is relevant to the offences that include, as an element, a "terrorist act".

Proposed item 9 introduces a definition of "advocates" for the purposes of Division 102 which relates to terrorist organisations. An organisation may be listed as a terrorist organisation if it advocates the doing of a terrorist act. In this sense, advocating relates to the violent aspects of the definition of terrorist act. If the advocacy is not intended to cause harm, death, endanger life of create a serious risk to public health and safety then it will not be advocating a terrorist act.

The definition of "advocates" is limited in its application to the process of listing terrorist organisations. It is not relevant to the definition of "terrorist act" for the purposes of the offences in the Criminal Code, and accordingly, it is not necessary to amend paragraph 100.1.(3)(a).

6	**Ludwig**	**McDonald/Gray**	**26**	**Senator LUDWIG**—There is one matter. I am still following up on that issue about penalties. If you go to the explanatory memoranda, it says: The offence in section 102.6 of the *Criminal Code*, dealing with providing funds … or receiving funds from … or on behalf of a terrorist organisation, clearly comes within the ordinary meaning of 'financing of terrorism offence'. That is where it is from. It continues: Section 102.6 should have originally been included in this definition and this amendment corrects this oversight. When you look at 102.6(1) and 102.6(2), they deal with penalties of 25 years and a maximum penalty of 15 years. And yet 103.2 in the explanatory memoranda provides for life; it seems to be the justification for why you have got life. This has obviously been raised in submissions as well, but it is inconsistent with that earlier provision, which seems to split the difference between intention and recklessness. It also provides, in the case of intention, 25 years rather than life, while 103.1 has life but it then splits it with recklessness of 15 years. It seems to be that for the financing of terrorism there are penalties ranging from 15 years for recklessness, life for recklessness and similarly 25 years or life for intention, depending on the standard. They might all be different. To save time I am happy for you to take it on notice, but can you at least provide a simple justification for why there is a requirement to have those different penalties provided to those standards? Maybe you were not seeking coherency? **Mr Gray**—I am not sure that it would be possible to provide an answer to that. Life imprisonment under 103.1 is where the money is going directly to a terrorist act, and 102.6 has an organisation interposed, so you could justify a difference in penalty level. But the second part of your question is: why are there differential penalties under 102.6 and not under 103.1? I cannot see any logical reason why there would be that difference. **Mr McDonald**—With organisational offences, clearly the awareness of the organisation comes into it a bit. That is actually quite a big factor, which is probably why historically it has become a bigger focus in the context of the organisation. **Mr Gray**—I am sure that is the reason. **Mr McDonald**—They have been there for a while anyway. **Mr Gray**—I am sure that is why imprisonment for life appears in 103.1, but I really could not offer an answer off the top of my head as to why there is not the differential in 103.1. **CHAIR**—Would you like that to be taken on notice, Senator Ludwig? **Senator LUDWIG**—I did suggest they could take it on notice. **Mr Gray**—I am not sure we will find the answer. **CHAIR**—Would you do that, because it is best to try and explore it properly by taking it on notice and responding to the committee one way or the other.

Existing section 103.1 of the Criminal Code, with which proposed section 103.2 is consistent in terms of the applicable fault element and penalty, and section 102.6 were inserted by separate Acts.

In each of the offences in subsections 102.6(1) and 106.2(2) and in subsections 103.1(1) and 103.2(1), the prosecution is required to prove **intention** in relation to the relevant conduct. That means the prosecution must prove beyond reasonable doubt that the person **intentionally** made funds available or collected funds.

The offences is subsections 102.6(1) and 106.2(2) deal with funding in relation to **terrorist organisations**, while the offences in subsections 103.1(2) and 103.2(1) deal with funding a **terrorist act**. Because of the higher culpability of funding a **terrorist act** itself as opposed to a **terrorist organisation,** as well as the sensitivities associated with offences that are related to terrorist organisations as opposed to terrorist acts, it is appropriate that a higher penalty of **life imprisonment** attach to the offences in subsections 103.1(2) and 103.2(1) than to the offences in subsections 102.6(1) and 106.2(2).

In the offences in subsection 102.6(1), the prosecution must prove that the person **knows** the relevant organisation is a terrorist organisation, while in subsection 102.6(2), the prosecution must prove the slightly lower standard that the person was **reckless** as to the fact that the relevant organisation is a terrorist organisation. The higher penalty in subsection 102.6(1) (25 years imprisonment) reflects the higher fault threshold than applies to the offences in subsection 102.6(2) (which carries a penalty of 15 years imprisonment). Because of the sensitivities associated with funding terrorist organisations, it is more critical that a higher level of fault is proved to justify the penalties. In the offences in subsections 103.1(2) and 103.2(1), the prosecution must prove that the person was **reckless** as to the fact that the funds would be **used to facilitate or engage in a terrorist act**. Life imprisonment is justified on the basis of the culpability associated with funding terrorist acts, and it is not considered necessary to prove that the person **knew** the funds would be used in relation to the terrorist act, provided the person **was aware of a substantial risk,** and having regard to the circumstances, **it was unjustifiable for the person to take that risk** (section 5.4 of the Criminal Code).

7	**Brandis Ludwig**	**McDonald**	**31**	**Senator BRANDIS** Secondly, in relation to the provision concerning control orders that the person subject to the order is to be furnished with a statement of grounds—and you will recall we discussed this earlier in another place as well—it would not do violence to the scheme of the bill, would it, to also have the person furnished with the material on the basis on which the order was made—in other words, the evidentiary material—so long as the appropriate excisions in relation to national security matters were made? I do not understand it to be controversial with anyone respectable that those excisions should be made. We could do that, couldn't we? **Mr McDonald**—Can I take that on notice? I would need to confer with people. **Senator BRANDIS**—Thank you. In doing so, would you particularly have regard to what I thought was Mr Walker's helpful suggestion that the criteria listed in the AD(JR) Act in relation to AAT decisions might be imported into the bill? **Mr McDonald**—I will review that. **Senator LUDWIG**—On that point, does that include reasons or details of the substance of the information? Or, if you say no to Senator Brandis in that sense, can you look at the iterations of that below that? **Mr McDonald—**I think you are starting to drag us into an AD(JR) type thing. But let me take all of that on notice and I will have a look at it. I found that part of Mr Walker's presentation very interesting.
8	**Brandis**	**McDonald**	**31**	**Senator BRANDIS** Thirdly, in relation to preventative detention orders, help me if I am wrong about this, but I do not think the bill has a similar requirement that the grounds—and, by extension, a statement of non security-sensitive evidentiary material—is required to be given in relation to preventative detention orders. Am I wrong about that? If I am, can you point me to where we say that? **Mr McDonald—**It is proposed section 105.3(2). There is a mention of the NSI there. **Senator BRANDIS**—Okay. **Mr McDonald—**You have seen too many different drafts! **Senator BRANDIS**—I know. I dream about this bill. Can the same consideration be made of the statement of the non security-sensitive evidentiary material in relation to preventative detention orders as well as control orders? **Mr McDonald**—I will take that on notice as well.
9	**Ludwig**	**McDonald**	**32**	**Senator LUDWIG—**I think that area is section 105.28(2)(a) where, under the preventative detention order, there is a summary of grounds that have to be provided. I am interested in the same issue that Senator Brandis raised. I want to know, if you were not going to accept Senator Brandis's suggestion, whether or not it could include the reasons or not simply the facts themselves. **Mr McDonald—**Let me take that on board. I think I said earlier with regard to the other one that— **Senator LUDWIG—**I take it that your answer is the same—that is, that you will have a look at it. **Mr McDonald—**Yes.

Mr Walker suggested that the AD(JR) Act requirements for a statement of reasons be provided in this Bill. Section 13 of the AD(JR) Act provides that a decision maker may be requested furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision. The summary of grounds is designed to ensure the detained person is provided with a reason for the detention. The ADJR Act also envisages situations where providing reasons would not be appropriate and decisions under several pieces of legislation are excluded at Schedule 2 of that Act. For reasons of national or operational security which could place informants at risk, and could jeopardise the continuation of investigations, it would not be appropriate to require a full statement of reasons in relation to control orders and preventative detention orders.

In relation to providing the basis on which the order was made to the person detained or the subject of a control order, please see response to question 14 at page 15 of Attachment A and response to question 9 at page 7 of Attachment B to Attorney-General's Department Submission Number 2 of 22 November 2005.

10	**Payne**	**McDonald**	**33**	**CHAIR**—In relation to some aspects of preventative detention, in proposed item 105.12, subclause (2), the issuing authority can consider afresh the merits of making the order and so on, but as I understand it the bill does not have any capacity for the detained person or that person's lawyer to provide any information for the authority to consider at that point in time. I think they can make representations or provide further information to the nominated AFP member who is overseeing the order, but the AFP member is then under no obligation to present that information to the issuing authority. **Mr McDonald**—This question was asked by one of the states, and we intended to put something in the second reading speech to make it clear that there is no restriction on that. I am not 100 per cent sure. I will have to check the second reading speech just to be careful about that. However, there are obligations on the police to present any material that is put forward. **CHAIR**—Where is that obligation? In 105.19(8) (d), (e) and (f), the AFP member can receive representations, but there does not seem to be a subsequent obligation on the AFP member to pass those representations on, particularly in relation to 105.12. **Mr McDonald**—I am just looking at 105.11, which is where I expect to find this. I will go through it. The application— **CHAIR**—Do you want to take it on notice? **Mr McDonald**—I will take it on notice. There is all sorts of material there. There is an obligation on the AFP in here, as I recall, to put up stuff that is not only in favour of their case but also against their case. We will take it on notice, but it is there, I can assure you.

In the second reading speech, which is an explanatory statement for the purposes of section 15AB of the *Acts Interpretation Act*, the Attorney-General reinforced the point that the intention of the Bill is to allow further information to be put before the issuing authority at the time the preventative detention order is continued.

Section 105.17 obliges the police detaining the person to apply for revocation of the order if satisfied that the grounds cease to exist. The same is also true of prohibited contact orders. A preventative detention order includes interim and continuing orders (see item 18 of Schedule 4).

Section 105.4(7) provides that an issuing authority may refuse to make an order unless the AFP provides further information that is requested. This can be used if the issuing officer is made aware of information raised by the person's legal representative. The legal representative is entitled to have contact with the person under section 105.37.

11	**Crossin**	**McDonald**	**34**	**Senator CROSSIN**—You have clarified for me the term 'as soon as practical', but there are just a couple of things that I want to address. Regarding the control orders in the bill, the issuing authority does not seem to have the power to amend the summary of grounds that is provided to the detainee. Should they have that power? **Mr McDonald**—I heard that suggestion. I think there could be some sense in clarifying that. I thought that was something that could be— **Senator CROSSIN**—Otherwise, if they do not have that power, I assume that the preventive detention order would be quashed. You would have to start again if you do not have the power to amend it. **Mr McDonald**—I heard that comment and it sounded like a good idea. It is something that I would like to take away and think about. I will get back to you quickly. It sounded like a good idea, because it is a bit unclear. The summary was something that was negotiated late in the piece. **Senator CROSSIN**—The other thing I wanted to ask about is that there is an implied common law obligation for the issuing authority to give the subject an opportunity to be heard before making the decision. Is that correct? **Mr McDonald**—That is the creation of statute. **Senator CROSSIN**—I wonder whether it should really be expressed in the bill in more straightforward terms. **Mr McDonald**—Let me think about that one, too. It is getting late in the day and I am taking more and more on notice.

The Bill does not provide for an issuing authority to settle the summary of grounds for control orders. In the case of an interim control order, the summary of grounds must be served on the person as soon as practicable and at least 48 hours before the date set for confirmation of that interim order by the Court (section 104.12). Likewise, the person who issues the preventative detention order does not settle the summary (section 105.32).

12	**Brandis**	**McDonald**	**38**	**Senator BRANDIS**—Give me an example of conduct which the new sedition laws would catch which would not be caught by either or more of the existing sedition laws, the existing treason laws, the existing law of incitement of violence and the new proposed law in relation to praising terrorism. **Mr McDonald**—First of all, on the new provisions about praise— **Senator BRANDIS**—No. Give me an example of conduct that would not be caught. **CHAIR**—Let Mr McDonald get to the point. **Mr McDonald**—First of all, the praise stuff is completely out of the picture because that is about organisational conduct. **Senator BRANDIS**—Let me expand my question to include if the praise were not limited to organisations but extended to individuals, which was Senator Mason's suggestion. Give me an example of some conduct that would be caught by the new sedition laws but would not be caught by any of the other laws, including praise laws— **CHAIR**—Okay, he has got the drift. **Mr McDonald**—It is something along the lines that all people of a particular racial group should be kicked out of Australia—something like that. **Senator BRANDIS**—The Racial Discrimination Act would catch that, I suppose. **Mr McDonald**—I love these hypotheticals. **Senator BRANDIS**—It is not a hypothetical; in fact, it is the opposite. You are being asked for a specific example of conduct. I understand that it is not you, but the government is saying, 'We need these laws to deal with certain conduct.' That is fair enough. That argument cannot logically be made unless it is a given that the existing laws or other proposed laws elsewhere in the bill do not deal with that conduct. **Mr McDonald**—How about I deal with it in this way: I will prepare some examples for you. **Senator BRANDIS**—That would be good. **Mr McDonald**—I will not comment any more, but I will certainly be reviewing some of the matters that I have looked at before. **CHAIR**—The committee is really seeking some clarity on those elements which Senator Brandis and Senator Mason set out. I think it is fair to say we do not think we have received it and come to that point yet.

Please see the covering letter to Attorney-General's Department Submission Number 2 of 22 November 2005.

13	**Brandis**	**McDonald**	**41**	**Senator BRANDIS**—Mr McDonald, I am not persuaded that schedule 7 is necessary, so what I am about to say is because I have reserved my position in relation to that. Let us say the bill were to be enacted with schedule 7. I take you to page 30 of the Human Rights and Equal Opportunity Commission's principal submission. At the foot of page 30 is recommendation 21, which offers some proposed further amendments to strengthen the defences to the proposed expanded offence of sedition, including expanding the defence in relation to encouragement of the discussion on matters of public interest, which is in recommendation 21(a), and broadening the defence in relation to performance, exhibition and artistic work, which is in recommendation 21(b). You might want to take this on notice: were those proposals to be adopted and the defences expanded along those lines, would it do violence to the legislative scheme? It does not seem to me as though it would, but it might settle the concerns of a lot of people. **Mr McDonald**—We will take that on notice. Providing that this attempt to encourage discussion on matters of public interest does not get stretched out to enabling people to think they can— **Senator BRANDIS**—Well— **Mr McDonald**—Providing 80.3(2) is left in place, which provides that the court take into account— **Senator BRANDIS**—Nobody is suggesting that it not be left in place, so that is a given. **Mr McDonald**—Let us take it on board. Personally I think that the artistic work one is unnecessary. These are things that— **Senator BRANDIS**—You take that on notice—the question being: would it do violence—

Please see pages 3 to 4 of the covering letter for the Attorney-General's Department Submission Number 2 of 22 November 2005.

14	**Nettle**	**McDonald**	**43**	**Senator NETTLE**—We had an example yesterday about the comments made by ACTU Secretary Greg Combet that he would not pay a $33,000 for asking people to be treated fairly and will be asking other union leaders to do the same. The suggestion from the witness yesterday was that that may fall within the seditious intention part of this legislation by urging a person: ... to attempt to procure a change, otherwise than by lawful means, to any matter established by law of the Commonwealth; **Mr McDonald**—First of all, the seditious intention definition relates to declaring organisations to be unlawful associations. There are some offences that apply to unlawful associations. An organisation declared to be an unlawful association has to be approved by the Federal Court. There is no declared unlawful association that I am aware of and I do not think it has been used for a long time; I am not even aware of when it has been used. I will take your question on notice, but that provision is a provision which, if you removed schedule 7, would continue to be on the statute book. Removing this from the bill would mean that the existing provision would stay there because it would not be repealed. If someone could, in theory, be caught under part 2A under this or what was there before, it would be much the same result, that is all I can say. All this stuff about this definition re-enlivening this law is total bunkum. It is what they talk about in New South Wales because they have all these old offences in their Crimes Act. On one count we did there was something like 150 theft and fraud offences in the New South Wales legislation. So they often talk about dead law in New South Wales because they have so much of it. The reality is that anyone can be prosecuted under one of these old laws. That is why they need clean up their Crimes Act and do what we have done progressively with ours. **Senator NETTLE**—I would appreciate it if you could take that on notice. It did not relate to bits being removed or not being removed; it related to whether or not it was covered. **Mr McDonald**—I probably should have said that it is not really our role in Attorney-General's to comment on specific cases. My answer might be, 'I can't really comment on a specific case.' **CHAIR**—But if you would just explore that.

Please see page 4 of the covering letter for the Attorney-General's Department Submission Number 2 of 22 November 2005.

15	**Nettle**	**McDonald**	**44**	**Senator NETTLE**—Verso Books in Britain have just announced that they will publish the collected writings and statements of Osama bin Laden and that they will be distributed in bookstores in Australia by Macmillan in December. The AFP said yesterday that sedition laws were in place to stop writings that promote violent jihad. Is that an example of something that would fall under the sedition laws? **Mr McDonald**—The existing ones or the new ones? **Senator NETTLE**—Either. **Mr McDonald**—I think the answer has to be the same: I would have to look at the facts. It is not really my role to say whether or not people are committing offences under the existing law. But what I will try and do is to give you a helpful answer. I cannot go around and say that people have committed offences. It is really for the police to decide whether they should be charged, and then it is for the DPP and so on. So I have to be a little bit careful about that. I will try and give you a helpful answer. **CHAIR**—Thanks. We cannot ask any more than that.

Mr Lawler of the AFP stated that "*The committee would recall media coverage this year of publications inciting violence for sale in Australia which highlighted that there is currently no clear offence to deal with this situation. The proposal in the Bill for modernising the sedition offences is intended to address this type of situation."*

The Attorney-General's Department submission Number 2 address in detail the sedition provisions. Whether a person is prosecuted or convicted with a Commonwealth offence is always a matter for the Commonwealth Director of Public Prosecutions and the courts to decide

16	**Nettle**	**McDonald**	**44**	**Senator NETTLE**—Yes. I do not understand exactly how it is being used in the United Kingdom, but my understanding is that they are using terrorism powers to stop and search. It appears that, as with the section in here, there are offences that follow on from that. Those terrorism powers in the UK are being used to stop and search protesters. **Mr McDonald**—I see. **Senator NETTLE**—My question is about whether that is also provided for in this legislation. **Mr McDonald**—Just protests? **Senator NETTLE**—Yes. That is what they are stopping and searching in the UK under terrorism powers. **CHAIR**—Would you like to take that on notice, Mr McDonald? **Mr McDonald**—I do not think that is covered by this. I will absolutely double-check for you, but I do not think it is covered by this. **Senator NETTLE**—Maybe I can ask the same question in relation to schedule 6, with the powers to detain. That is even more explicit in saying that it is the power to obtain documents that relate to serious offences.

Schedule 5 provides the AFP with powers to stop, question and search people who are in a Commonwealth place, if the officer suspects on reasonable grounds that the person has just committed, might be committing or might be about to commit a terrorist act, or if the person is in a "prescribed security zone". The Minister may declare, in writing, a specified Commonwealth place to be a prescribed security zone if the Minister considers that such a declaration would substantially assist in either preventing a terrorist act occurring or responding to a terrorist act which has occurred.

This means that these powers are connected to terrorist acts. There is a specific exception in the definition of terrorist act which excludes protests from the meaning of "terrorist act".

Schedule 6 provides the AFP with powers to request information or documents about terrorist acts from operators of aircraft or ships and to obtain documents relating to serious terrorism and serious non-terrorism offences. In relation to serious non-terrorism offences an AFP officer has to apply to a Federal Magistrate for a notice if the officer considers on reasonable grounds that the person has documents that are relevant to and will assist the investigation of a serious offence. If the Magistrate is satisfied on the balance of probabilities that a person has documents that are relevant to and will assist the investigation of a serious offence, the Magistrate may issue a written notice to the person to produce documents.

Only documents that relate to determining one or more of the following matters can be obtained:

The following documents may be obtained in relation to terrorism or serious non-terrorism offences.

1. whether an account is held by a specified person with a specified financial institution, and details relating to the account and of any related accounts;

2. whether a specified person is a signatory to an account with a specified financial institute, and details relating to the account and of any related accounts;
3. whether a transaction has been conducted by a specified financial institution on behalf of a specified person and details relating to the transaction (including details relating to other parties to the transaction);
4. whether a specified person travelled or will travel between specified dates or locations and details relating to the travel (including details relating to other persons travelling with the specified person);
5. whether assets have been transferred to or from a specified person between specified dates, and details relating to the transfers (including details relating to the names of any other person to or from whom the assets were transferred);
   whether an account is held by a specified person in respect of a specified utility (such as gas, water or electricity) and details relating to the account (including the names of any other persons who also hold the account);
6. who holds an account in respect of a specified utility (such as gas, water or electricity) at a specified place, and details relating to the account;
7. whether a telephone account is held by a specified person and details relating to the account, including details of calls made to or from the relevant phone number, the times at which the calls were made or received, the duration of such calls or the telephone numbers to and from which such calls were made and received;
8. who holds a specified telephone account and details relating to that account (including specific details mentioned in paragraph (h) above);
9. whether a specified person resides at a specified place; and
10. who resides at a specified place.