



public interest
ADVOCACY CENTRE LTD

**Submission to the NSW Attorney General on the
review of the *Law Enforcement (Powers and
Responsibilities) Act 2002 (NSW)* and *Terrorism
(Police Powers) Act 2002 (NSW)***

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Natasha Case
Senior Solicitor

1. Introduction

1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1.2 PIAC's work on the *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)* and *Terrorism Act 2002 (NSW)*

PIAC has made many submissions about proposed anti-terrorism legislation and contributed to many inquiries and reviews of such legislation in both the NSW¹ and Commonwealth² jurisdictions.

¹ See Robin Banks and Jane Stratton, *Submission to NSW Parliamentarians on the Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005* (2005) <<http://www.piac.asn.au/publications/pubs/nswterrsub.pdf>> at 15 October 2009; Robin Banks and Jane Stratton, *Submission to the NSW Attorney General on the Terrorism (Police Powers) Act 2002 (NSW)* (2005) <<http://www.piac.asn.au/publications/pubs/NSW%20terror%20police%20powers%20sub.pdf>> at 15 October 2009; Robin Banks and Natasha Case, *The Case for Repeal: Submission to the Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002(NSW)* (2007) <http://www.piac.asn.au/publications/pubs/sub2007071_20070703.html> at 20 July 2009; International Commission of Jurists, PIAC, Combined Community Legal Centres Group, NSW, Australian Lawyers for Human Rights, Sydney Centre for International Law, NSW Council for Civil Liberties, *Open Letter to the NSW Government*, 20 March 2009.

² See, eg, Patricia Randal, *Submission to the Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Bills* (2002) <http://www.piac.asn.au/publications/pubs/antiterr_20020924.html> at 7 August 2009; Annie Pettitt, *Submission to the Inquiry into the Anti-Terrorism Bill 2004* (2004) <<http://www.piac.asn.au/publications/pubs/PIACATsubmission%20April04.pdf>> at 20 July 2009; Annie Pettitt,

1.3 The need for anti-terrorism laws versus the cost to society

The rationale for the significant range of 'national security' legislation being passed at both state and federal levels has been that, as a result of the attacks in the USA, Bali, London and Madrid, we are now living in a 'new security environment'. PIAC has in the past, and continues to challenge this characterisation.

However, even if we are to accept that there is a 'new security environment', this does not, in PIAC's view, justify the measures that have been introduced. PIAC continues to have significant concerns about the constitutionality of various aspects of the counter-terrorism regime, the lack of necessity and proportionality for these measures, the extent to which the legislation complies with Australia's obligations under international human rights treaties including the *International Covenant on Civil and Political Rights*³ and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,⁴ and its potential to lead to

Supplementary Submission to the Inquiry into the Anti-Terrorism Bill (2004)

<[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(153683DB7E984D23214BD871B2AC75E8\)~04.05-Supp+Sub+re+Anti-Terror+Bill1.PDF/\\$file/04.05-Supp+Sub+re+Anti-Terror+Bill1.PDF](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(153683DB7E984D23214BD871B2AC75E8)~04.05-Supp+Sub+re+Anti-Terror+Bill1.PDF/$file/04.05-Supp+Sub+re+Anti-Terror+Bill1.PDF)> at 20 July 2009; Annie Pettitt and Robin Banks, *Submission to the Senate Legal and Constitutional Committee Inquiry into the Anti-Terrorism Bill (No 2)* (2004) <http://www.piac.asn.au/publications/pubs/submission_anti-terrorism_bill.pdf> at 20 July 2009; Annie Pettitt and Robin Banks, *Submission to Parliamentary Joint Committee on ASIO, ASIS and DSD Review on the listing of Al Qa'ida, Jemaah Islamiyah, the Abu Sayyaf Group, the Armed Islamic Group, the Jamiat ul-Ansar, the Salafist Group for Call and Combat as terrorist organisations under section 102.1A of the Criminal Code* (2005)

<<http://www.piac.asn.au/publications/pubs/Submission%20to%20PJC%20re%20terrorism%20groups.pdf>> at 20 July 2009; Robin Banks and Jane Stratton, *Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD Review of Division 3, Part III of the ASIO Act 1979 (Cth) – Questioning and Detention Powers* (2005)

<<http://www.piac.asn.au/publications/pubs/Submission%20to%20PJC%20on%20ASIO%20question%20detain.pdf>> at 20 July 2009; Robin Banks & Jane Stratton, *Submission to the Senate Legal and Constitutional Committee on the Inquiry into the Provisions of the National Security Information Legislation Amendment Bill 2005 (Cth)* (2005)

<<http://www.piac.asn.au/publications/pubs/Submission%20on%20the%20National%20Security%20Information%20Legislation%20Amendment%20Bill.pdf>> at 20 July 2009; Robin Banks & Jane Stratton, *Supplementary submission – Review of Division 3, Part III of the ASIO Act 1979 (Cth)*(2005)

<<http://www.piac.asn.au/publications/pubs/supplementary.pdf>> at 20 July 2009; Robin Banks and Jane Stratton, *Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD on the relisting of Hizballah External Security Organisation, HAMAS' Izz al-Din al-Qassam Brigades; Lashkar-e-Tayyiba; and the Palestinian Islamic Jihad* (2005) <http://www.piac.asn.au/publications/pubs/terrorgsub_20050729.html> at 20 July 2009; PIAC, *Submission to the Senate Legal and Constitutional Legislation Committee on the Anti-Terrorism Bill (No 2) 2005 (Cth)* (2005) <http://www.piac.asn.au/publications/pubs/anti-terrorism_bill.pdf> at 20 July 2009; Robin Banks, *Inquiry into the provisions of the Anti-Terrorism Bill (No 2) 2005: Response to Questions on Notice and Transcript for Proofing* (2005) <<http://www.piac.asn.au/publications/pubs/Senate%20re%20questions%20on%20notice.pdf>>

at 20 July 2009; Robin Banks and Vijaya Rahman, *Review of the Listing Provisions of the Criminal Code, Submission to the Parliamentary Joint Committee on Intelligence and Security* (2007)

<<http://www.piac.asn.au/publications/pubs/07.01.15%20-PIAC%20Sub-PJCIS.pdf>> at 20 July 2009; Letter from Federation of Community Legal Centres, Victorian Council for Civil Liberties, Australian-Tamil Rights Advocacy Council, PIAC, Combined Community Legal Centres Group, NSW, Robert Stary and Associates, AMCRAN and Human Rights Law Resource Centre, *The Report of the Clarke Inquiry*, letter to the Commonwealth Attorney General, The Hon Robert McClelland MP, 21 November 2008.

³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ratified by Australia on 13 August 1980 (entered into force for Australia on 13 November 1980, except article 41, which entered into force for Australia on 28 January 1993).

⁴ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ratified by Australia on 8 August 1989 (entered into force for Australia on 7 September 1989, except articles 21 and 22, which entered into force for Australia on 28 January 1993).

discrimination and vilification. Furthermore, PIAC has consistently argued that the counter-terrorism legislation suffers from a lack of transparency and fails to establish adequate mechanisms of accountability, oversight and review.

PIAC remains of the view that these laws are unnecessary and constitute an unjustifiable breach of a range of human rights, including the right to liberty, the right to a fair trial and the rights to privacy, freedom of speech and freedom of association. PIAC's view is supported by the findings of the International Commission of Jurists, which in its report *Assessing Damage, Urging Action*,⁵ found that there is no justification for the anti-terrorism laws introduced globally following 11 September 2001 and that these laws have done much to damage both civil society and the international legal framework, including human rights.

In PIAC's view, the damage to civil society and human rights caused by anti-terrorism legislation is nowhere more apparent in Australia than in NSW, where the extraordinary powers conferred on police by anti-terrorism legislation have been extended to general policing. Of course, the justification given for the enactment of anti-terrorism does not apply to similar legislation enacted for reasons unrelated to the supposedly 'new' environment engendered by global terrorism.

It is against this background that PIAC makes the following submissions in relation to the reviews of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (*LEPRA*) and the *Terrorism (Police Powers) Act 2002* (NSW) (*Terrorism Act*).

2. Review of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW)

2.1 Extension of extraordinary powers to general policing

PIAC is concerned about the trend of extending the extraordinary powers granted to police and other law officers in the context of anti-terrorism legislation into general policing. This is demonstrated in NSW by the enactment of the following legislation:

- *APEC Meeting (Police Powers) Act 2007* (NSW) (*APEC Act*), which prohibited certain speech and movement in a range of areas in Sydney, in breach of the rights to liberty and freedom of speech;
- *World Youth Day Act 2006* (NSW) and *World Youth Day Regulations 2008* (*WYD Act*), which created a range of association offences contrary to the right to freedom of association and, notoriously, an offence of 'annoyance' contrary to the right to freedom of speech;⁶
- *Law Enforcement (Covert Search Warrants) Act 2009* (NSW) (*Covert Warrants Act*), which permanently amended LEPRA not only to extend the regime of secret searches set out in the *Terrorism Act* to other areas of general policing but allowed such searches to be carried out in the neighbouring premises of persons not suspected of any criminal activity, in breach of the right of privacy;
- *Crimes (Criminal Organisations Control) Act 2009* (NSW) (*Anti-Bikie Act*), which permanently amended LEPRA to extend the regime of control orders set out in the *Terrorism Act* to members of bikie gangs, in breach of the right of freedom of association.

⁵ International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (2009).

⁶ In *Evans v State of NSW* [2008] FCAFC 130 the Federal Court declared these regulations invalid.

2.2 Necessity and proportionality

No evidence has been provided by the NSW Government to justify the enactment of the *Covert Warrants Act* or the *Anti-Bikie Act*. Without this evidence, it is not possible to assess whether it is proportionate to the stated objectives of the legislation.

Of equal concern to PIAC is the NSW Government's stifling of public debate by rushing 'emergency power' legislation through the Parliament without making publicly available important information such as the Ombudsman's report on the *Terrorism Act*⁷ or, apparently, considering the reports of the Legislation Review Committee, which in every case expressed concern about the likely impact of the laws on individual rights and freedoms.⁸ Part 6A of *LEPRA* was introduced and assented to on the same day (15 December 2005). The *Bikie Act* was assented to the day after its introduction to the Parliament and only days after the enactment of the *Covert Warrant Act*, which was itself enacted only weeks after its introduction but before the public release of the Ombudsman's review of the relevant provisions.

The Legislation Review Committee has found that all of the legislation referred to above breaches human rights, including the rights to liberty, fair trial, privacy, freedom of speech and freedom of association. In a jurisdiction with no overarching protection of civil rights, the views of review bodies such as the Ombudsman and the Legislation Review Committee are critical components of human rights protection. Notwithstanding that the NSW Attorney relies on review mechanisms such as the Ombudsman and the Legislation Review Committee to explain why he does not support more extensive human rights protection in Australia, his Government does not give them scope to operate effectively, thereby limiting the substantive protection of human rights in NSW. By taking this approach, PIAC submits, the NSW Government makes a convincing case for the urgent need for broad human rights protection in NSW and Australia.

The NSW Attorney General and the NSW Government should approach the review of anti-terrorism legislation in accordance with the principle that Australian law, including that of the states and territories, should be consistent with international law, in particular human rights standards. This job should not be left to the Commonwealth or a parliamentary committee. The whole of the NSW Government, and all governments in Australia, are responsible for recognising and protecting the human rights of all people within their jurisdiction.

⁷ NSW Ombudsman *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002* (2008) provided to the Government in September 2008 but not released to the Parliament until after the Parliamentary debates.

⁸ Legislation Review Committee, NSW, *Legislation Review Digest – APEC Meeting (Police Powers) Bill 2007*, (27 June 2007); Legislation Review Committee, NSW, *Legislation Review Digest – World Youth Day Amendment Regulation 2008* (22 September 2008); Legislation Review Committee, (NSW) *Legislation Review Digest – Crimes (Criminal Organisations Control) Bill 2009*, (4 May 2009) 13; Legislation Review Committee, NSW, *Legislation Review Digest – Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009* (10 March 2009).

Recommendation

1. *That the covert search warrant and anti-bikie provisions of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) be repealed immediately.*

2.3 Supervision and review

PIAC is deeply concerned that, to the extent that the *Covert Warrants Act* and *Anti-Bikie Act* give extraordinary powers to police, they are not subject to the same review mechanisms as similar powers granted under the *Terrorism Act*.⁹

The Commonwealth Government is poised to create an office of the National Security Legislation Monitor (NSLM). If this office is created in accordance with the recommendations of the Senate Finance and Public Administration Legislation Committee report,¹⁰ it will have supervision of state and territory anti-terrorism legislation. However, even if the NSLM is created, it will not have supervision of the non-terrorism related extraordinary powers created by the *Covert Warrants Act* and *Anti-Bikie Act*.

PIAC submits that the same level of supervision should be provided for the exercise of extraordinary powers exercised with respect to both terrorism and general policing.

The NSW Ombudsman does not support the creation of a NSW-based Public Interest Monitor modelled on the same examples leading to the proposal for the NSLM but instead recommends that those responsibilities be conferred on his own office.¹¹ It is PIAC's view that an independent and specialist supervisor of anti-terrorism and all extraordinary police powers is preferable to supervision by generalist agencies such as the Ombudsman.¹² PIAC therefore renews its call for the creation of a specialist Public Interest Monitor in NSW to supervise all extraordinary police powers. However, in the absence of a specialist supervisor, PIAC recommends that the Ombudsman be responsible for reviewing anti-terrorism and all other extraordinary police powers and be required to conduct such reviews and deal with any complaints in respect of such powers completely independently of the NSW Police Force.¹³

Recommendation

2. *PIAC recommends that, if the Law Enforcement (Covert Search Warrants) Act 2009 (NSW) and the Crimes (Criminal Organisations Control) Act 2009 (NSW) are not repealed, then as a matter of urgency:*
 - a. *The Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) be amended to include a provision similar to section 36 and section 27ZC of the Terrorism (Police Powers) Act 2002 (NSW) in respect of the covert search warrant and anti-bikie provisions;*
 - b. *Supervision of powers under both the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) and the Terrorism (Police Powers) Act 2002 (NSW) be referred to the National Security*

⁹ Section 36 in respect of the whole Act including control orders, section 27ZC in respect of covert search warrants.

¹⁰ Senate Finance and Public Administration Legislation Committee, *Report on the Inquiry into the National Security Legislation Monitor Bill 2009* (2009), Recommendation 7.

¹¹ NSW Ombudsman, above n 7, para 5.4.

¹² See, eg, Lizzie Simpson *A step in the human rights direction: Submission on the National Security Legislation Monitor Bill 2009* (2009).

¹³ In respect of the inadequacies of the NSW police oversight system, see Simon Moran & Charmaine Smith *Submission to the Ten Year Review of the Police Oversight System in NSW* (15 May 2006) <http://www.piac.asn.au/publications/pubs/06.05.15-PIAC%20Sub%20re%20Police%20Oversight.pdf>, 20 October 2009.

Legislation Monitor, a NSW Public Interest Monitor or the NSW Ombudsman acting independently of the NSW Police Force.

3. Ombudsman’s scrutiny of exercise of powers under Part 2A and 3 of the *Terrorism (Police Powers) Act 2002* (NSW)

PIAC repeats its call for the repeal of the *Terrorism Act*. However, if the Act is to remain in place, PIAC agrees with many of the recommendations made by the Ombudsman in his review report.¹⁴ Where PIAC disagrees with the Ombudsman, PIAC notes its views below.

3.1 Covert search warrants

This is the Ombudsman’s final report on covert search warrants pursuant to section 27ZC of the *Terrorism Act*. As stated above, it is possible that a Commonwealth National Security Legislation Monitor will serve this function. If not, then PIAC submits that a specialist Public Interest Monitor should be created in NSW and charged with the supervision of all extraordinary police powers. If a Public Interest Monitor is not created, then PIAC supports the Ombudsman’s recommendation that its supervision of this part of the *Terrorism Act* by his own office, be extended on the condition that any review or complaint investigation be conducted by the Ombudsman completely independently of the NSW Police Force.

3.2 Preventative detention

PIAC submits that the fact that these powers have not been used indicates that they are not necessary and renews its call for these provisions to be repealed. Further, the report of the Inquiry by the Hon John Clarke QC into the case of Dr Mohamed Haneef (November 2008)¹⁵ demonstrates that the danger of abuse, whether intentional or inadvertent, is very real. In PIAC’s submission, that danger should not be tolerated and the laws should be repealed.

PIAC submits that stronger measures than those the Ombudsman is content to rely upon, such as individual management plans (see para 3.5.5 of the Ombudsman’s report) and existing police complaints procedures, are required to ensure that the human rights of detainees are protected. PIAC recommends that the *Crimes (Administration of Sentences) Act 1999* (NSW) or relevant regulations be amended to make express reference to the human rights of detainees and that these rights should be protected in the administration of detainees. This would also bolster the somewhat weak recommendations of the Ombudsman in respect of the protection of the rights of juveniles (Recommendations 15, 16, 17, 18).

It is disappointing that the relevant agencies have not enabled the Ombudsman to properly report on the preventative detention provisions because they have not finalised the procedures that will determine the impact of the regime on peoples’ rights, particularly those of juveniles and incapable persons.¹⁶

¹⁴ NSW Ombudsman, above n 7.

¹⁵ MJ Clarke QC, Report of the Inquiry into the Case of Dr Mohamed Haneef (2008).

¹⁶ NSW Ombudsman, above n 7, Chapter 3.

Recommendations

3. *That the Terrorism (Police Powers) Act 2002 (NSW) be repealed in its entirety. Alternatively, that supervision of powers under the Terrorism (Police Powers) Act 2002 (NSW) be referred to the National Security Legislation Monitor, a NSW Public Interest Monitor or the NSW Ombudsman acting independently of the NSW Police Force.*
4. *That the rights of detainees, including juveniles, be protected by legislation rather than by administrative processes and policy alone.*