



THE LAW SOCIETY OF THE AUSTRALIAN CAPITAL TERRITORY

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The Legislative Assembly (ACT)
Standing Committee on Legal Affairs
Civic Square
London Circuit
CANBERRA ACT 2601

Dear Sir/Madam

TERRORISM (EXTRAORDINARY TEMPORARY POWERS) BILL 2005 **ACT LAW SOCIETY COMMENT**

- 1 The Criminal law Committee of the ACT Law Society takes the opportunity to comment on the Terrorism (Extraordinary Temporary Powers) Bill 2005.

Philosophical comment

- 2 The Law Society takes the view, stated shortly, that there is no demonstrated need for the powers provided under this Bill. The justification for the introduction of these powers appears not to be based on a thorough analysis of threat, but rather as a reaction to recent international incidents.
- 3 We agree with the position enunciated by the Law Council of Australia. That position is summed up in the President of the Law Council, John North's observation that "We support proper measures which protect the community from terrorist acts. However, we're very concerned that individual's rights will be further constrained by this proposed legislation."
- 4 We oppose preventative detention without charge. The powers envisaged strike against fundamental freedoms. Unless required to provide care for the person to be detained, deprivation of liberty is – and should remain – either *punishment* for proven criminal behaviour as a last resort, or the result of a considered judicial decision to refuse bail where charge/s have been laid and are waiting proper determination.
- 5 The introduction of Preventative Detention Orders allow for a person to be taken into custody, and to have their individual freedoms seriously impinged in circumstances where a charge has not been laid and where it is likely there would be insufficient evidence to support a criminal charge in any event.
- 6 Having said that, we understand that the decision has been made to legislate for Preventative Detention and Special Powers in line with a political agreement reached at a national head of government level.
- 7 We acknowledge that the ACT Government is concerned to ensure that the new laws comply with human rights obligations and that there are sufficient safeguards within the scheme of the legislation to prevent misuse. We welcome the inclusion of provision in the Bill dealing with those issues. We are also pleased that no preventative detention orders are to be made involving children.
- 8 The following brief comments are made regarding the Bill as currently presented.

Drafting

- 9 The Society is very concerned that parts of the Bill are not “user friendly” and have been drafted in an unnecessarily complicated fashion.
- 10 In particular, we note that clause 12 is extremely difficult to understand. The heading refers to restrictions on multiple preventative detention orders, but it is hard going to work out what the restriction actually is. An explanatory memorandum may assist, but the wording of the section is ambiguous.
- 11 Similarly, the important provisions in clause 13 outlining the restrictions on the periods of detention are not drafted in plain English. Where deprivation of liberty is involved the legislation permitting that to happen must be readily understood. The reference to “maximum 24-hour period”, “maximum 7-day period” and “maximum 14-day period” is confusing.
- 12 In what circumstances are overlapping Preventative Detention Orders to be allowed? The “maximum 14-day period” as defined suggests that periods can be in excess of 14 days. Does that not conflict with what is intended in clause 12?
- 13 The provisions as to duration of Orders are incomprehensible.
- 14 We strongly recommend that those sections be redrafted in a way that makes the meaning clear.

Public Interest Monitor

- 15 The Society is in favour of the inclusion of a Public Interest Monitor. There is a role to be played by an independent person where preventative detention orders are being sought.
- 16 We suggest that the role of the PIM could be more explicit. While the Bill provides in clause 15 for the PIM to be present at the hearing of an application, we submit that the same person could play a role in monitoring an order after it is made. The PIM should be allowed to be present at *any* subsequent proceedings. Consideration should be given to allowing the PIM to initiate proceedings to set aside or amend under Clauses 28 and Clause 31.
- 17 We note that the PIM is to be a lawyer: clause 59. We do not object to that. We are concerned that the practitioners who are likely to be appointed to the panel would also be practitioners who would most likely be approached to act for people about whom Preventative Detention Orders were being sought. We ask whether being on the panel would disqualify the practitioner from accepting instructions in respect to an application? Obviously a practitioner could not act in a matter and also be appointed as the PIM, but would being on the panel mean the practitioner should not act in other cases? The Territory does not have a large group of legal practitioners who practise in this area of law.

Legal Aid

- 18 The Bill places on the Legal Aid Commission an obligation to provide a solicitor to a person who is the subject of an application for preventative detention: clause 49(5).
- 19 The Society agrees that the person who is the subject of an application must be entitled to engage legal representation. Bearing in mind the limited resources available to the Legal Aid Commission we believe it appropriate that the usual legal aid guidelines as to a persons financial capacity should apply.

Monitoring contact with lawyers

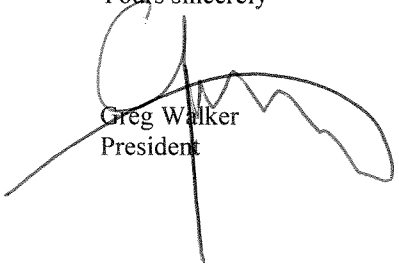
- 20 The Society expresses unease about the provisions of Clause 53. Whilst it is necessary for the legal Aid Commission to be notified and the PIM consulted the decision to monitor contact with lawyers remains a final decision for the senior police officer.

- 21 It is our view that an order must be obtained from the Supreme Court to permit monitoring of contact with a lawyer. At the very least we submit the Clause should require the agreement of the PIM.
- 22 Regarding clause 54, we submit that it does not make sense to cause contact with a lawyer to be subject to a prohibition on contact order given the other safeguards concerning contact with lawyers. It could potentially remove the ability to be represented.

Jurisdiction

- 23 The Society supports the proposal that applications for Preventative Detention Orders should be heard in the Supreme Court. It is important that a senior judicial officer is responsible for deciding such applications.
- 24 For the same reason we suggest that applications for special powers should also be made to a Supreme Court Judge – rather than before either a Judge or a Magistrate (clause 61).
- 25 There appears to be no impediment to requiring applications to be heard in the Supreme Court. It would be more appropriate that all applications under this Bill be made to the same court.

Yours sincerely



Greg Walker
President