

**THE AUSTRALIAN CAPITAL
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Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
Legislative Assembly for the ACT
GPO Box 1020
CANBERRA ACT 2601



Dear Bill,

RE: Draft Terrorism (Extraordinary Temporary Powers) Bill 2005 (ACT)

The Australian Capital Territory Bar Association congratulate the stand taken by Jon Stanhope in relation to this matter. His championing the ACT Human Rights Act and his exposure of the Draft Legislation of the Commonwealth has engendered healthy debate and brought about amendments which have ameliorated the departure from the rule of law proposed by the Commonwealth.

However, the Law Council of Australia has the support of all the Bars in Australia in response (enclosed) to this legislation. The ACT Bar Association accordingly, also supports the Law Council's response. This Bar supports effective and strong legislation that counters terrorism.

Thank you for inviting our comments.

Yours sincerely

F.J. Purnell SC
Representative of the ACT Bar Association
on Counter Terrorism Laws

	A.C.T. LEGISLATIVE ASSEMBLY COMMITTEE OFFICE
SUBMISSION NUMBER	2
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Law Council of Australia

Summary Comment¹ on Draft Bill²

Proposal	LCA Response
Control Orders Control orders can impose obligations, prohibitions and restrictions on persons in relation to their movements and associations. Persons might be confined to their homes or to specified localities, manacled with a tracking device, restricted in their use of technology, photographed and fingerprinted, not allowed to leave Australia, required to report to specific persons and forbidden to associate or communicate with specified individuals. A control order may exist for a period of 12 months and successive control orders may be made.	Control orders should not be introduced into Australian law. Persons not charged with or found guilty of a criminal offence should not be subjected by the State to such restrictions on their freedom. The power to make control orders is to be given to Federal Courts and is likely to be non-judicial. Absent from the Draft Bill are proper safeguards including fair procedure, the opportunity for the person the subject of the order to challenge its application, and disclosure of the basis upon which orders are sought and made. Federal Courts should not be asked to discharge such functions because they are not incidental to the exercise of judicial power and undermine the integrity of the judiciary and the proper administration of justice. Judicial review of the Attorney General's consent to an application for a control order should be permitted in accordance with the <i>Administrative Decisions (Judicial Review) Act 1977</i>. Control orders are contrary to international human rights treaties (International Covenant on Civil and Political Rights 1966) ratified by Australia.
Preventative Detention Orders Preventative detention orders will allow persons to be detained for up to 14 days. Except in limited circumstances detained persons may not contact another person. Contact by a detainee with a lawyer is limited and may only take place if the content and meaning of communication between them can be monitored by the AFP.	Preventative detention orders should not be introduced into Australian law. Persons not charged with or found guilty of a criminal offence should not be imprisoned by the State. Absent from the Draft Bill are proper safeguards including fair procedure, the opportunity for the person the subject of the order to challenge its application, and disclosure of the basis upon which orders are sought and made.

¹ Not all matters of concern to the Law Council have been included in this summary.

² Draft Bill as released by ACT Government in October.

Proposal	LCA Response
	The power to make detention orders is given to federal judicial officers in their personal capacity. To require them to make detention orders is to require them to complete tasks incompatible with their office. Judicial review of decisions to make detention orders should be permitted in accordance with the <i>Administrative Decisions (Judicial Review) Act 1977</i>. Preventative detention orders are contrary to international human rights treaties (International Covenant on Civil and Political Rights 1966) ratified by Australia.
Use of Force The new powers authorise the use of force to take persons into preventative detention and extend to: - the power to cause the death of the person to be detained where the police believe that causing death is necessary to protect life or prevent serious injury; or - where the person attempts to escape being taken into custody and the police believe that causing death is necessary to protect life or prevent serious injury and the person has, if practicable, been called on to surrender and that the person cannot be apprehended in any other manner.	Reasonable powers to effect apprehension are warranted but a new power expressly authorising police to cause the death of a detainee who is not being arrested because he or she is believed to have committed a criminal offence is unacceptable. Where no future terrorist act is imminent the power to cause death should not be available in relation to detention orders that are made with the sole objective of protecting evidence of a terrorist act that has already occurred.
Sedition The offence of sedition is inappropriately expanded to catch the behaviour of 'urging' and the element of recklessness. The current law of sedition applies to actions which cause violence and requires proof that the accused acted with intent and knowledge.	Persons can be convicted of sedition for 'urging' others to commit violence against the community or to assist the enemy. This raises serious issues and difficulties for media commentators, broadcasters, publishers and protesters. The proposed offences will extend culpability to reckless behaviour which need not have caused a result provided that it contributed to the result. The new offences erode free speech and may be unconstitutional due to their breadth.

Proposal	LCA Response
Financing Terrorism A person will commit the offence of financing a terrorist by making funds available to another, directly or indirectly, or by collecting funds. The person need not have known or intended to finance a terrorist. In this regard, it is sufficient for the person to have acted recklessly.	The broadening of existing offences to include the element of 'recklessness' threatens to catch innocent, well-meaning people and to stifle community generosity. Such provisions have the potential to exacerbate community and racial tensions. Casting the scope of these offences so wide is likely to create uncertainty and produce unjust consequences. In the case of reckless financing of a terrorist act, the penalty of life imprisonment is unreasonable and not proportionate to an offence unknowingly committed by a person.
Representation by a Lawyer Persons the subject of a control or detention order have limited rights of contact with a lawyer (and family). Lawyer-client communications will only be permitted in circumstances where they can be monitored by police. Face-to-face contact with a lawyer appears to be denied – contact by fax, email and telephone is all that is permitted. Unless effective monitoring can be undertaken by a police officer, contact with a lawyer (or family member) will not be allowed at all. Lawyers (and their clients) have no right to information which is said to justify orders.	Communication between a person and his or her legal adviser in these circumstances should be completely privileged. It is extraordinary that a person not charged with any criminal offence should not be entitled to at least the same level of privileged communications with his or her lawyer as is provided for persons charged with criminal offences. Police monitoring of communications between lawyers and their clients in these situations should not be allowed. Lawyers should be entitled to know the facts and other grounds which form the basis of an order.
Reporting and Review The Attorney General must prepare an annual report on the operation of laws relating to detention and control orders and table it in Parliament.	The operation of the Anti-Terrorism Bill 2005 should be subjected to periodic statutory reviews similar to the review provided under the <i>Security Legislation Amendment (Terrorism) Act 2002</i>. Information in the annual report should specify the number of young persons aged 16-18 years, foreign nationals and orders not granted or varied by a court.