



Australian Government
Attorney-General's Department

**Security and Critical
Infrastructure Division**

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Dr Hanna Jaireth
Inquiry Secretary – *Terrorism (Extraordinary Temporary Powers) Bill 2005*
Standing Committee on Legal Affairs
ACT Legislative Assembly
GPO Box 1020
CANBERRA 2600 ACT

Dear Dr Jaireth

Inquiry into the Exposure Draft Terrorism (Extraordinary Temporary Powers) Bill 2005 (ACT)

I refer to the letter of 19 December 2005 from Bill Stefaniak MLA, Committee Chair for the Inquiry into the Exposure Draft Terrorism (Extraordinary Temporary Powers) Bill 2005 (ACT), inviting officers from the Department to participate in the Committee's inquiry concerning the exposure draft of the Terrorism (Extraordinary Temporary Powers) Bill 2005 (the ACT Bill).

This submission includes comments from the Security Law Branch, the Human Rights Branch and the Office of International Law of this Department.

Terrorism (Extraordinary Temporary Powers) Bill 2005

The ACT Bill provides for two new regimes: preventative detention orders and special powers authorisations. This submission briefly addresses those two regimes separately.

Preventative Detention

Part 2 of the ACT Bill provides for a new regime for preventative detention orders that complements the Commonwealth preventative detention regime recently inserted into the *Criminal Code Act 1995* (Criminal Code) by the *Anti-Terrorism Act (No. 2) 2005* (Anti-Terrorism Act).

The Department notes that one of the main objectives of the decision on the Council of Australian Governments at the Special Meeting on Counter-Terrorism on 27 September 2005 was that jurisdictions develop consistent legislation which will facilitate the investigation of terrorist conduct by law enforcement agencies in Australia. In this context, the Department considers the preventative detention regime in the ACT Bill differs from the preventative detention regime in the Criminal Code to a greater extent than the complementary preventative detention legislation that has been developed in other jurisdictions. Some examples of these differences are briefly outlined below.

Threshold for applications

The grounds for applying for and for making a preventative detention order under sections 17 and 19 of the ACT Bill differ from the grounds applicable under section 105.4 of the Criminal Code. In particular, the threshold of “reasonable and necessary” in sections 17 (applying for a preventative detention order), 19 (making a preventative detention order), 25 (application for extension of preventative detention order) and section 29 (prohibited contact orders) is a higher threshold than “reasonably necessary” in the Criminal Code.

Given that the Australian Federal Police (AFP) is likely to be exercising powers under both regimes, the Department considers it would be preferable for the ACT Bill to adopt the same tests as the Commonwealth legislation, and notes that the Commonwealth test is also used in other jurisdictions. For example, see section 26D of the *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005 (NSW)* and section 8 of the *Terrorism (Preventative Detention) Act 2005 (Qld)*.

Information required in the application

Section 17 requires the applicant to include a large volume of information in an application for a preventative detention order. The Department acknowledges the need for decision-makers to be furnished with sufficient information upon which to make a decision. However, it would be expected to take a long time to collect the large volume of information required to be included in the application. This is particularly the case given the serious and urgent nature of applying for an order, the object of which is to prevent an imminent terrorist attack.

In addition, the Department notes that proposed paragraph 18(k)(vi) of the ACT Bill includes a requirement to include information about periods of detention of a subject under a warrant issued under Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act). There is no equivalent requirement in the Commonwealth regime, and the Department is concerned that this requirement could be contrary to section 34VAA of that Act depending on the circumstances. Section 34VAA makes it an offence to disclose certain information about a warrant for a person’s questioning or detention, including the fact of the warrant’s existence while the warrant is in force (28 days) and operational information thereafter.

The purpose of the ASIO questioning warrant regime is to gather intelligence – the regime does not perform a law enforcement function. In contrast, the purpose of a preventative detention order is quite different – to hold someone potentially for a longer period to prevent that person committing a terrorist act or to collect evidence following such an act.

There are significant accountability mechanisms scrutinising questioning and detention under the ASIO Act. A warrant may only be issued, and questioning and detention occur, where a person may have information that is important in relation to a terrorism offence. A person can only be detained in limited circumstances set out in the ASIO Act. This requirement is supported by safeguards including the issuing of a warrant by a federal judge or federal magistrate, the supervision of proceedings by a former judge, and the independent oversight of the proceedings by the Inspector-General of Intelligence and Security. Various other safeguards are set out in the ASIO Act and its Protocol.

The ASIO regime is fundamentally different to, and entirely separate from, the preventative detention regime contemplated by the ACT. In addition, the significant safeguards ensure persons are only questioned or detained in appropriate circumstances for a period of time necessary and in

accordance with legislative requirements. Coupled together, these facts indicate that it would not be necessary to provide information to the issuing authority of the preventative detention order that a person has been detained under the ASIO Act. For these reasons the Department considers it to be inappropriate for information about detention under an ASIO warrant to be a **requirement** of an application for a preventative detention order under the Bill.

Access to sensitive or national security information

The preventative detention regime in the Criminal Code provides that the person the subject of an order is entitled to a summary of the grounds of the order, and subsections 105.7(2A), 105.8(6A), 105.11(3A) and 105.12(6A) specifically provide that such a summary is not required to include information, the disclosure which is likely to prejudice national security within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*. This is an important safeguard to ensure sensitive information is not provided to a person who is being detained to prevent a terrorist act.

There is no such safeguarding of sensitive or prejudicial information in the ACT Bill. As a result, the police could be required to provide to the detainee all information on which the application was based. This could include, for example, information that is likely to prejudice national security, information that might be protected by public interest immunity. The Department believes it is vital that legislation contain appropriate protections for sensitive information, and is concerned that a requirement to provide all information to the detainee could have a chilling effect. That is, individuals in the community might be less likely to come forward with information about suspected terrorists for fear of having their identity disclosed to a potential terrorist. Similarly, the police might be less likely to apply for a preventative detention order to prevent a terrorist act for fear of putting ongoing operations by law enforcement agencies or intelligence agencies, the safety of law enforcement officers, intelligence officers, or the community at risk.

The Department notes that the complementary legislation enacted in other jurisdictions contains such safeguards. For example, see section 26J of the *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005 (NSW)* and section 23 of the *Terrorism (Preventative Detention) Act 2005 (Qld)*.

No preventative detention of “children”

The ACT Bill prohibits preventative detention of “children”, but does not provide a definition of that term or refer to a definition in another Act. Nor is there a reference to the meaning of the word at the end of the Bill as being a term defined by another instrument, such as the *ACT Legislation Act 2001*. If it is intended to rely upon the definition of “child” in the *ACT Legislation Act 2001*, this will have the undesirable effect of limiting preventative detention orders to persons at least 18 years of age. The lower age limit of 16 years has been adopted by the Commonwealth and other jurisdictions. Alternatively, if there is no intention to define “children”, this is likely to result in uncertainty as to who may be detained under the ACT regime.

The Commonwealth preventative detention regime prohibits the detention of persons under 16 years of age, and contains special safeguards and limitations in relation to the detention of young persons under 18 years of age. The complementary preventative detention legislation that has been enacted or developed in other jurisdictions in Australia is consistent with the Commonwealth model. The Department suggests the Committee consider recommending the inclusion of a definition of “children” that is consistent with the minimum age of 16 years in the Commonwealth regime, as well as the inclusion of appropriate safeguards and limitations for detainees under 18 years old.

People under 18 years of age have participated in terrorist attacks in other countries. Indeed many suicide bombers are young people.

Release from detention

The Department notes that section 39 of the ACT Bill provides that, once a detainee has been released from detention, the preventative detention order “lapses”. This is inconsistent with the regime in the Criminal Code, paragraph 105.26(7)(b) of which specifically provides that a person who has been released from preventative detention (for example, to be dealt with in accordance with a warrant under section 34D of the ASIO Act or under the provisions of Division 4 of Part IAA, or Part IC of the *Crimes Act 1914* (Crimes Act)) may subsequently be taken back into custody under the preventative detention order.

While the maximum detention period under the Commonwealth regime is 48 hours, the maximum period under the ACT Bill is 14 days. The Department considers there is a real possibility that it could be necessary to release a person from an ACT preventative detention order for another purpose for a period of time in circumstances where the reasons why the preventative detention order was made continue to exist. The prohibition on multiple preventative detention orders in section 12 of the ACT Bill would preclude the making of further preventative detention orders in such circumstances, and could result in a person who continues to be a terrorist threat being released from custody. The Department suggests the Committee recommend the amendment of the ACT Bill to ensure persons temporarily released from preventative detention can be returned to lawful custody under a valid preventative detention order.

Detention Arrangements

Section 40 provides for detention arrangements. The Department understands the AFP has raised concerns about this provision, particularly the requirement to identify the places where detainees may be detained, and to provide access to information, from a security perspective. The Department is concerned that these requirements could also create difficulties in circumstances where preventative detention orders for multiple individuals are made during the same period, and the listed places do not provide for sufficient space.

The provision also requires that detainees be detained in the ACT. This requirement could create difficulties, for example where a person who is the subject of an ACT preventative detention order is located and taken into custody by police in another jurisdiction. This is particularly the case if there are medical or other impediments to transporting the person to the ACT.

The Department considers there is merit in providing the maximum amount of flexibility in the arrangements for detention, without compromising the need to treat detainees appropriately.

Monitoring contact with lawyer

The ACT Bill provides that contact with a lawyer is not to be monitored unless there are reasonable grounds to believe such contact will result in a number of listed consequences, including the destruction of evidence or the alerting of another suspect. The Commonwealth regime provides for monitoring of all contact with a lawyer, but contains a protection in subsection 105.38(5) that such communications are not admissible in any proceedings in a court.

It is important to acknowledge that a person will only be in preventative detention to prevent a terrorist act or the destruction of evidence of a terrorist act. Where the police are aware of a

connection between the detainee and a third person that could frustrate the purpose of the preventative detention order, the police can seek a prohibited contact order to prevent communications between the detainee and that third party. However, such mechanisms will be ineffectual if the detainee is able to communicate with that third party through any other person, including a family member or a lawyer. Persons with whom a detainee seeks contact during the period of preventative detention, including a person purporting to be a lawyer or family member of the detainee, may not be known to police. Under those circumstances, it would be impossible to determine the likelihood of the detainee passing on information to third parties through a lawyer. Accordingly, the Department considers the ACT Bill should be amended to provide for all communications between a detainee and other persons to be monitored. Whether or not the ACT Bill is amended in this way, the Department considers a provision excluding the admission of such communications in proceedings in a court should also be included.

Arbitrariness of detention

While the maximum period of detention under the Commonwealth regime in Division 105 of the *Criminal Code Act 1995* is 48 hours, the ACT Bill provides for detention for up to 14 days, with an initial order being for 24 hours and then the continued order for seven days with an extension of another seven days possible. However, the Department considers that the preventative detention regime in the ACT Bill contains sufficient safeguards to ensure that any detention would not be considered arbitrary.

The ACT Bill currently contains the following safeguards to ensure that preventative detention is not arbitrary:

- the preconditions for the application in that it must be made by a senior police officer to the Supreme Court only if the police officer suspects on reasonable grounds that the person intends and has the capacity to carry out a terrorist attack or has something in his or her possession or has prepared for a terrorist attack
- all orders are made by the Supreme Court of the ACT (including initial preventative detention orders), thus giving the orders judicial legitimacy
- the judge has to be satisfied that detention is the least restrictive way of preventing a terrorist attack or preserving evidence
- a hearing to determine the continued preventative detention order must be conducted after 24 hours in the presence of the person concerned and his or her lawyer
- the person concerned is given full reasons for the preventative detention in the form of the application to the court
- the person concerned may have contact (subject to prohibited contact orders and monitoring) with family members in person or by telephone
- the officers involved in preventative detention must have training in human rights
- the person has access to a lawyer to discuss the detention, the treatment in detention, the order and review or challenge of the order without restriction unless certain concerns are noted by a senior police officer and even then a public interest monitor must be consulted about the decision to monitor contact with the lawyer and if the contact is then monitored, it must not be recorded, and
- the role of the public interest monitor to ensure that an independent person is aware of and monitors the detention.

The Department notes that after the initial 24 hours detention, unless the person detained contacts the ombudsman or seeks judicial review of the detention, the ACT Bill does not provide for review of the detention until the completion of seven days detention. However, the very fact that the person can seek review of the detention through outside means ensures that the lawfulness of the detention may be reviewed and should mean that the detention is not considered arbitrary.

Balance

Human rights treaties provide that certain rights can be subject to restrictions necessary to protect national security or maintain public order. It is the view of the Australian Government that, compared to the ACT Bill, the Commonwealth preventative detention legislation more properly reflects this balance and properly protects individuals from threats to their security.

Constitutionality

Constitutional limitations prevent the Commonwealth Government from conferring the power to preventatively detain persons for a period as long as 14 days on the AFP – a Commonwealth agency. The Department is not aware of any advice obtained by the ACT that considers whether those Constitutional limitations would also prevent the ACT Government from conferring those powers on the AFP.

The Department notes that, in contrast to the Commonwealth regime, in which preventative detentions orders are not issued by courts, under the proposed ACT Bill, such orders will be issued by the ACT Supreme Court. While this may overcome the Constitutional impediments to the conferral of similar powers on the AFP under Commonwealth legislation, the Department considers it would be prudent for the Committee seek such assurances from the ACT.

Special Powers Authorisations

Part 3 of the ACT Bill provides for preventative and investigative authorisations that authorise the exercise of certain powers in order to prevent or investigate a terrorist act. The powers are only exercisable in specified “target” areas. The special powers authorisations complement the powers to stop, question and search persons in relation to terrorist acts that were inserted into the Crimes Act by Schedule 5 of the Anti-Terrorism Act.

Power to give directions to departments etc

Section 86 authorises the chief police officer to give the responsible chief executive of a department or entity directions in relation to the exercise of functions of that department or entity. Directions can be given to facilitate the exercise of another power under Part 3 of the ACT Bill, and the responsible chief executive officer is required to comply with them.

The intended operation and scope of this provision is unclear. For example, it is unclear whether the provision is designed to ensure the co-operation of departments and entities with the police to ensure there are no impediments to the police in undertaking those powers, or whether the provision seeks to significantly extend the powers of the police beyond the specific powers conferred by Part 3 of the ACT Bill.

It is unusual that coercive powers that can be exercised by law enforcement officials are not clearly and unambiguously conferred in the primary legislation, and not subject to extension by an executive order.

Publication of Special Powers Authorisations

The ACT Bill does not appear to contain any requirement to notify persons in the “target area” of the creation of a “target area”. In contrast, under the Commonwealth regime in Division 3A of Part IAA of the Crimes Act, when a Commonwealth place is declared as a “prescribed security zone”, the Minister is required to arrange for a statement identifying the prescribed security zone to be broadcast by a television or radio station so as to be capable of being received within the place, be published in the Commonwealth *Gazette*, and be published on the Internet.

The Department suggests the Committee consider recommending the inclusion of such a requirement to ensure that persons who might be affected by the exercise of powers under the authorisation are aware of its existence.

General

The Department thanks the Committee for the opportunity to comment on the ACT Bill. The action officer for human rights issues is Geoff Skillen who can be contacted on 02 6250 6450, for ASIO issues is Douglas Rutherford who can be contacted on 6250 5619, and for other issues is Karen Bishop who can be contacted on 02 6250 6926.

Yours sincerely

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