

Submission to the Standing Legal Affairs Committee (SLAC) on the exposure draft
Terrorism (Extraordinary Temporary Powers) Bill 2005 (ACT)
by Civil Liberties Australia (ACT) Inc., A04043

Civil Liberties Australia (ACT) [CLA] thanks the Legislative Assembly for the opportunity to comment on the *Terrorism Extraordinary Temporary Powers) Bill 2005 (ACT)*. We wish to make a number of comments – some dealing in more general terms with the purported rationale said to make such extraordinary laws necessary, and others addressing the text of the Bill itself.

Fundamentally, we question the necessity for such laws. It is our submission that current laws are adequate and sufficient, as demonstrated by the arrest of alleged offenders late in 2005.

Both ASIO and the Queensland Government agree on this point with CLA. On 19 May 2005 the former head of ASIO, Dennis Richardson, was asked by Senator Robert Ray when appearing before the Parliamentary Joint Committee into ASIO, ASIS, and DSD, whether he was “satisfied that the existing powers equip you to do the job you need to do.” He replied “Yes.”¹

On the morning of the COAG meeting of 27 September 2005, Queensland Premier Peter Beattie said that the Qld police have advised him that they are not being hampered by a lack of powers and that “they’re comfortable with where they are.”²

The same type and nature of threat that exists today existed in May and September 2005, so there is no need for increased powers. CLA accepts that there are people in the community intent on doing Australia and its citizens harm. But that threat, and the

¹ *Commonwealth Parliamentary Debates*, Parliamentary Joint Committee on ASIO, ASIS and DSD, transcript of public hearings, Canberra, 19 May 2005.

² Transcript of radio interview, ABC ‘AM’ Program, reporter: Alexandra Kirk, “*Premiers seek proof anti-terror laws are necessary*”, 27 September 2005.

proposed extreme curtailment of fundamental rights and freedoms that underpin our society, need to be put into perspective.

In 2005 there were no terrorist attacks in Australia. At the same time there were approximately 1600 people killed on Australian roads³, 10 people struck by lightning⁴, and many thousands who died of obesity-related causes (various research reports).

Even the arguments of proponents of the new anti-terror laws claim that a terrorist threat, at its most extreme, will only affect a comparatively small number of people. There is therefore no evidence of balance or perspective in the proposed national and ACT legislation which attacks Australians' fundamental freedoms – such as habeas corpus and the right to a speedy trial before peers.

The situation begs the question: given that the threat to community safety from road accidents or obesity makes the threat from terrorism look tiny in comparison, why have respective governments not passed such draconian laws with respect to those who might pose a threat to road safety (such as car makers), or those who contribute daily to obesity in young people (such as firms selling fast food)? We offer a cynical answer: passing such laws is not politically or electorally expedient.

The impetus for recent anti-terror legislation appears to have come largely from the Federal Coalition government. They have engaged – and continue to engage – in the politics of fear. By playing on the public's emotions and ramping up people's fears, some unscrupulous politicians are exaggerating a problem to induce widespread insecurity – only to then put themselves forward as the saviours of society, in this case by passing draconian laws which impinge on traditional rights of Australians.

³ See "Road Safety South Australia", http://www.transport.sa.gov.au/rss/content/safer_people/programs_resources/2004_road_toll_review.htm

⁴ Australian occupational Health and Safety Index, <http://www.safetyline.wa.gov.au/pagebin/injrsign0209.pdf>

It is an illusion that laws born of fear are protective. It was Thomas Jefferson, a founding father of American democracy, who rightly said that “he who is prepared to sacrifice his freedom for some temporary safety is deserving of neither freedom nor safety.”

To his credit, and in response to a question on what Australia should do in response to terrorist attacks, Prime Minister John Howard, said that: “we have to live our lives, we can’t be frightened to live, otherwise the terrorists win.”⁵ It is often said that in the face of terrorism we can never give in or change our way of living, otherwise the terrorists win. CLA agrees with these sentiments.

Unfortunately, the recent national (and the proposed ACT) anti-terror laws achieve a result at odds with these principles. Proponents of these laws have blinked in the face of terrorism. They have proposed laws which subtract from our commitment to fundamental democratic freedoms and human rights, and add to the power and impact of terrorists operating, so far, entirely outside Australia.

The laws clearly would change our society and our way of living in response to terrorists. The changes diminish our freedom, and so would be welcomed by terrorists. As such, the laws represent a terrorist victory.

It is our submission that the attack on fundamental and democratic rights implicit in the proposed anti-terror laws is not proportional to the threat from terrorism. This is especially so when legislators have not acted to curb society’s traditional freedoms in relation to other more immediate, demonstrable and serious threats to community safety such as traffic deaths or obesity.

That said, we do note that the provisions contained in the ACT Bill are an improvement on those contained in the *Anti-Terrorism Bill 2005* (Cth). They do have enhanced

⁵ Transcript of interview between the Prim Minister and Glenn Milne, Channel Seven News, 14 October 2002.

safeguards on fundamental civil liberties and are not as offensive to our basic standard of decency and freedom as the provisions of the Commonwealth Act are.

PREVENTATIVE DETENTION REGIME

We note that in section 3 of the preamble of the Bill it is asserted that any new law must be, *inter alia*, “necessary” and “effective against terrorism,” and section 8 of the Bill provides that the purpose of the preventative detention regime is to “prevent terrorist act that is imminent”.

We reject that these laws are necessary, as pre-existing laws are adequate to deal with the threat of terrorism. It is already the case that if two or more people are planning or preparing to commit a terrorist offence, then they are conspiring to commit such an offence.

Section 48 of the *Criminal Code Act 2002* (ACT) provides that it is an offence to conspire to commit an offence. The penalty for engaging in a criminal conspiracy is equal to the penalty for the offence that the parties have conspired to commit: see *Criminal Code Act 2002* (ACT), s 48(4). Moreover, if the police or other law enforcement agencies suspect on reasonable grounds that someone is conspiring to commit an offence, they can arrest that person and take them before the courts, where the accused may be denied bail and held on remand: see *Crimes Act 1900*, s 212; *Bail Act 1992* (ACT).

Similar provisions apply when a person is not planning to commit a terrorist act, but is in some other way knowingly concerned, that is to say, they are complicit: see complicity provisions in *Criminal Code Act 2002* (ACT), s 45. Again the police can arrest in such circumstances and the courts can deny bail with respect to complicity offences.

The existence of laws already enabling terror suspects to be arrested and detained clearly shows the proposed preventative detention regime is born out of political expediency and is not necessity.

UNIMPEDED ACCESS TO LAWYERS

Section 53(2) of the Bill provides that it is possible for the police to monitor, if certain conditions are satisfied, conversations between a lawyer and a person held in preventative detention. It is our submission that such a situation is highly objectionable.

CLA notes with approval the findings of the Australian Law Reform Commission with respect to communications between lawyers and their clients:

...the proper functioning of our legal system depends upon freedom of communication between legal advisers and their clients which would not exist if either could be compelled to disclose what was passed between them for the purpose of giving or receiving advice.⁶

Clearly if the police are listening in on a conversation, the client will be reluctant to talk frankly and freely. We note that it is often the case that an accused person might be involved in some degree of wrongdoing which is why they have come to the attention of authorities in the first place, but they are often not guilty of crimes of the seriousness alleged by the police. This means that if section 53 of the Bill were to be enacted in its current form an undesirable paradox may arise in that a person responsible for minor wrongdoing is wrongfully convicted of a more serious offence because they have not properly communicated with their lawyer out of fear of being convicted of the less serious offence.

It is our view that it is in the public interest that some incriminating evidence may be denied from authorities if that is necessary to protect innocent people from wrongful

⁶ Australian Law Reform Commission Report 26, vol 1, para 878, quoting *Baker v Campbell* (1983) 153 CLR 52 at 128 per Dawson J.

conviction: one of the few things worse than a guilty person escaping punishment is an innocent person being wrongly convicted.

CLA recommends that section 53 be omitted from the Bill.

Issues involving the admissibility of evidence obtained under section 53 of the Bill arise. It would appear, *prima facie*, that section 53 would have no impact on the operation of sections 118 and 119 of the *Evidence Act 1995* (Cth)⁷ which provides that confidential communications between clients and lawyers are inadmissible in legal proceedings. It is extremely important that that should remain to be the case.

Should the committee recommend that section 53 of the Bill remain, care should be taken to ensure that it can in no way undermine the operation of section 118 and 119 of the *Evidence Act*. We recommend that a sub-clause to this effect be included in section 53 should the committee decide to keep this section. Moreover, the inclusion of a provision reiterating that nothing contained in communications monitored by the police can be used against the accused might go some way to alleviating the problems discussed earlier; accused persons would be less likely to worry that what they say to their lawyer will be used against them.

Should section 53 be retained in its current or a similar form we would also propose an additional safeguard. Where a senior police officer has issued a direction that a conversation be monitored because he or she believes that one of the grounds set out in section 53(2) will be satisfied, and after monitoring the communication, evidence, information or intelligence relevant to a section 53(2) ground has not been disclosed, then that evidence, intelligence or information should be destroyed.

⁷ It needs to be remembered that the Commonwealth *Evidence Act 1995* applied to proceedings in ACT Courts.

COMPENSATION FOR EXERCISE OF SPECIAL POWERS

Section 85(3) of the Bill provides that a court may order the payment of “reasonable compensation for the loss or expense only if it is satisfied it is just to make the order in the circumstances of the particular case”.

This provision appears to contain a drafting error in that it is imposing an additional standard in claiming compensation for the use of a ‘special power’ over and above the requirements for succeeding in such actions already existing at law.

Arguably the provision might be read to create a new type of action for compensation where a person suffers loss as a result of the exercise of the ‘special powers’ – if a person could show loss, then they would be entitled to reasonable compensation if they can show that it is just that such an action be made in that case.

However, another construction of the section might be made by a court which would be detrimental to the plaintiff, especially when bringing an action for damages for the use of a special power under another area of the law; say, for example, an action in tort for personal injury. The court might read section 85(1) to mean that it does have the power to award damages in tort, but in light of section 85(3), only when it is just in the circumstances of the particular case. A requirement that it is just in the circumstances might deny a plaintiff compensation they might have otherwise received. For example, if in a tort action for personal injury the plaintiff might be seeking to rely on the “egg-shell principle”⁸ this requirement might negate compensation ordered on that basis as it might be argued to be unreasonable.

It is submitted that any potential ambiguity or problems this section might create could be ameliorated by adding an additional subclause to the effect that this section does not operate to limit rights and remedies otherwise available at law.

⁸ See *Kavanagh v Akhtar* (1998) 45 NSWLR 588 for an example of this principle.

Furthermore, given the extreme intrusiveness that these powers entail, and the extreme distress that might accompany the exercise of these powers, even if exercised reasonably, we suggest that where the police damage something, compensation should be awarded on a strict liability basis. Invariably, property of innocent people might be damaged in the exercise of these ‘special powers’ – doors might be smashed in, electronic devices such as computers might be dismantled, etc. There should be no need for tests of ‘reasonableness’ etc – if it is in the public interest that such damage be done, then the public purse should pay for it. An obvious exception is where the damage is done to the property of a person convicted of the offence in relation to which the damage was done.

PUBLIC INTEREST MONITOR

In the view of the CLA (ACT) it is an essential that protection of the public interest be instilled by an independent review of the operation of this legislation. We agree with measures for the annual report to the Legislative Assembly and a more general review after four and a half years, in advance of a sunset clause of five years. However we submit that a Public Interest Monitor should be established, with community representatives, including Civil Liberty and human rights groups. Such a monitoring function would include identifying instances of the laws placing undue stress or burden on the families of suspects, including financial impact, adverse effect on reputation and social standing. All this, when the detained person may not be charged or guilty of a crime. From past experience, the chances for errors by ASIO detaining people of interest is very high. A Public Interest Monitoring group would identify and make recommendations to rectify these occurrences, and to monitor and report on the implementation of the legislation in general.

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