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Ms Robina Jaffray
Secretary
Standing Committee on Legal Affairs
Legislative Assembly for the ACT.

4/07/2005

Re: Inquiry into Police Powers of Crowd Control

Dear Ms Jaffray,

Thankyou for your letter of 11 April 2005 inviting the Human Rights Office to participate in the Standing Committee on Legal Affairs inquiry into police powers of crowd control. Staffing difficulties have made it impossible for us to reply until now, but we understand that you would still welcome our comments.

The *Human Rights Act 2004* (HRA) is the source of several rights which are relevant to the police powers to regulate the actions of groups of people. In all cases their enjoyment is subject to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society (section 28). The Act thus provides a framework for examining whether a balance between individual freedom and the good order of the state has been achieved.

The HRA provides in Section 15 that everyone has the right to peaceful assembly and to freedom of association. Section 16 guarantees the right to hold opinions without interference and freedom of expression. Section 13 guarantees a person's freedom of movement. Section 12 guarantees the right to privacy and reputation and covers a person's physical integrity. While these rights are subject to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society (section 28) they go further than the preexisting law in upholding the rights of people to demonstrate in support of their beliefs. They may also limit the interpretation of ACT police powers to search or to move people on.

The right of assembly

The protection of the right of peaceful assembly applies regardless of whether an assembly causes a disturbance although it does not abrogate the right to regulate noise or disturbance that may result from it. They also protect a person from the opposition of others. Similar provisions in the United Kingdom *Human Rights Act 1998* have been interpreted by the European Court of Human Rights as follows.

"A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must however be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents"

The HRO is aware of a complaint before the Ombudsman about the use of OC(capsiacum) spray at a public rally on environmental issues held on 9th October 2004. While not commenting on the facts of the case itself we note that the AFP Guidelines, as used in the ACT context, should make clear that under the HRA it would be impermissible to disperse a public rally unless there was a threat of violence and that any use of an agent such as OS spray outside this circumstance would be likely to breach the Act as being disproportionate. We are aware that concerns have also been raised about the use of OC spray, particularly in relation to people with particular physical or mental health conditions and we have been notified that the Ombudsman will be dealing with this issue as well.

The Major Events Security Act 2000 also gives cause for concern. The wide powers it gives to the police to search without reasonable cause need to be interpreted consistently with the privacy right in the HRA. This would require these powers to be read down so that they are exercised for the purpose of security at those events and not for extraneous purposes. The power to ask for a person's name or address merely because s/he is attending an event, in the absence of any suspicion that the person is engaged in illegal conduct or has breached a condition of entry to the event is an infringement of privacy which cannot be justified under section 28. It should be restricted as suggested above, to where there is reasonable cause.

Moving people from public or private places

The right to freedom of movement and the right of private life is at issue when considering police powers to move people on. The powers in section 4 of the Crimes Prevention Powers Act 1998 allow police, on reasonable suspicion that a person is likely to engage in violent conduct, to direct that person to leave the vicinity for up to 6 hours. While the police power to defuse a potential breach of the peace is clearly compatible with human rights we note that the Australian Law Reform Commission Report in 1996 recommended that the direction to separate should only encompass a movement by one person in relation to another. Either in this way or at least by restricting the use of the power to the minimum time period necessary to defuse the situation the limitations on the rights mentioned above would be satisfied.

The *Emergencies Act* 2004 permits the police to arrest a person who is refusing to evacuate their home in the case of a bushfire. This applies even when there is no reason to believe that death or serious injury would result from the failure to move. The Human Rights Act gives the individual respect for his/her autonomy and the right to a home. While there is a duty in this situation on the police to save lives there in order to satisfy the proportionality test in section 28 of the HRA it is arguable that these powers should be restricted by reference to a level of risk of harm.

Yours sincerely,

Dr. Rowena Daw
Human Rights Legal Adviser