



**INQUIRY INTO EXPOSURE DRAFT
TERRORISM (EXTRAORDINARY
TEMPORARY POWERS) BILL 2005 (ACT)
LEGISLATIVE ASSEMBLY FOR THE ACT
STANDING COMMITTEE ON LEGAL AFFAIRS**

AUSTRALIAN LAWYERS ALLIANCE

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INQUIRY INTO EXPOSURE DRAFT: TERRORISM (EXTRAORDINARY TEMPORARY POWERS) BILL 2005

Introduction

The Australian Lawyers Alliance is an association of lawyers and other professionals dedicated to the protection and promotion of justice, freedom and the rights of the individual. As such, it is appropriate that we make a submission to the Committee in relation to this Bill, which provides powers to police and other officials to derogate from the rights of individuals in the ACT.

We oppose the Bill

It should be understood that we oppose the Bill in toto. We oppose the Bill because it weakens democracy in Australia which, like all democracies, relies on the rule of law to protect its citizens from the infringement of their rights by other citizens or by government. The Bill provides for the detention of a person on an arbitrary basis ('suspects, on reasonable grounds', s 17) without the person being charged with the commission of an offence. This provision curtails the most fundamental of an individual's rights, the right to physical liberty.

A democratic state may only take away the right of one of its citizens' to personal physical liberty for a very good reason. So far, there has been no satisfactory public justification for this fundamental breach of human rights. Instead, we have been asked to take on faith the assurances of our political leaders, police chiefs and intelligence chiefs that this Bill and those like it around Australia are necessary.

In addition, while there may be some justification for being able to hold a person for a short period to prevent an imminent terrorist act, it appears inconceivable that any person should be detained in order to preserve evidence of a terrorist

act. Nor is it clear why these powers are necessary, given that the relevant authorities already possess significant powers to arrest persons suspected on reasonable grounds of having committed an offence. It follows that these preventative detention provisions are aimed at persons not suspected of having committed any crime. We submit that it is disproportionate to use such powers merely to preserve evidence when, by necessary implication, those persons have not committed any offence and their detention without charge is not necessary to prevent an imminent terrorist act.

How the Bill could be improved

We understand that the ACT has agreed to enact laws containing such provisions and that the substance of this agreement is contained in *COAG Communiqué: Special Meeting on Counter-terrorism – September 27 2005*.¹ As we do not know what was discussed at the COAG meeting, we look to the words of the *Communiqué* to find out what the ACT must do in accordance with its agreement.

The substantive references to preventative detention in that document are found at paragraph 4 on page 3, paragraph 1 on page 4, paragraphs 3 and 4 and, to a lesser extent, the other paragraphs on page 9.

We submit that the language is at least ambivalent as to whether the parties have agreed to legislate for preventative detention to preserve evidence after a terrorist attack. We suggest that, on the face of it, the *Communique* does not mandate state and territory legislation for preventative detention to preserve evidence. Paragraph 3 on page 9 says, '[In relation to preventative detention orders COAG noted:] the AFP must have reasonable grounds that making the order would substantially assist in preventing a terrorist attack or, where a terrorist act has occurred, preserve evidence;' and the subsequent paragraph 4 says 'an AFP officer could issue an order for an initial 24 hours; that period could

¹ Appendix 1

be extended by an issuing authority for a further 24 hours only; the total detention period allowable would be a maximum of 48 hours’.

These paragraphs clearly refer to the Commonwealth orders and not the state and territory provisions. It might be more readily arguable that preventative detention (to preserve evidence) might be necessary (or, at least, convenient) for a period of 24 hours to allow time for the machinery of justice to crank up, but 14 days is less comfortably justified.

The other relevant reference is at paragraph 1 on page 4: ‘State and Territory leaders agreed to enact legislation to give effect to measures which, because of constitutional constraints, the Commonwealth could not enact, including preventative detention for up to 14 days ...’ There is no reference here to preventative detention to preserve evidence. We submit that the Assembly can restore some proportionality to the Bill by removing the power of preventative detention for 14 days to preserve evidence. Authorities could then rely on the Commonwealth provisions.

How does the Bill stack up?

Legislative responses to the perceived threat of terrorism appear to often assume that protecting and promoting rights cannot coexist with protecting the physical safety of the population. Human and civil rights are seen as obstacles to the prevention of terrorism. This false dichotomy is not supported by the Australian Lawyers Alliance. As Professor Charlesworth has said, ‘It’s important to begin with the observation that terrorism ... is itself a massive violation of human rights’² and that ‘at the end of the day, true human security depends on broadening respect for human rights, rather than treating human rights as dispensable when the going gets tough.’³ The promotion and protection of rights should not be seen as rhetoric that stands in the way of national security, a

² *Human Rights in the wake of terrorism* Vital Issue seminar, Parliament House, Canberra 16 October 2002

³ Ibid

dangerous misconception that leads to the belief that the protection of human rights will inevitably create a national security risk.

International Law

Indeed, exceptions to certain civil and political rights are already made in international law. The International Covenant on Civil and Political Rights (ICCPR) provides that some rights can be limited in specific circumstances. Article 4 of the ICCPR stipulates that where a public emergency threatens the life of the nation, parties to the Convention may take measures derogating from their obligations, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

The Australian Government signed the ICCPR on 13 November 1980.⁴ Australia also became a signatory of the Covenant on Economic, Social and Cultural Rights on 10 March 1976.⁵ The Australian Lawyers Alliance submits that Australian governments have an obligation to ensure that domestic law does not violate international treaties to which Australia is a signatory.

The United Nations General Assembly passed resolution 54/164⁶ on 24 February 2000. The resolution stipulates that 'all measures to counter terrorism must be in strict conformity with the relevant provisions of international law, including international human rights standards.'

The preamble to the Bill acknowledges⁷ that the Legislative Assembly 'is committed to fully implementing United Nations resolutions relating to terrorism by adopting counter-terrorism measures that are consistent with international human rights obligations' and 'that respect and promote the values reflected in,

⁴ <http://www.unhchr.ch/pdf/report.pdf>

⁵ *ibid*

⁶ UN Doc A/Res/54/164 (1999)

⁷ At points 5 and 6

and the rights and freedoms guaranteed by, the International Covenant on Civil and Political Rights.’

The ‘Rule of Law’

The essential characteristic of the ‘rule of law’ is that all authority is subject to and constrained by law. It is the opposite to discretionary rule by a person or group of people (such as a political party).

Chief Justice of the High Court of Australia, Murray Gleeson, believes that various judgments of the High Court, have identified some key principles of the rule of law.⁸ There must be some minimum capacity for judicial review of administrative action.⁹ There must be separation between executive and judicial functions.¹⁰ Judicial decisions are to be made according to legal standards rather than undirected considerations of fairness.¹¹ Citizens have a right to a fair trial,¹² and to privileged communications with legal advisers.¹³ The content of the law should be accessible to the public.¹⁴ Access to the courts should be available to citizens who seek to prevent the law from being ignored or violated, subject to reasonable requirements as to standing.¹⁵ Courts have a duty to exercise a jurisdiction which is regularly invoked,¹⁶ and citizens are equal before the law.¹⁷

⁸ http://www.hcourt.gov.au/speeches/cj/cj_ruleoflaw.htm

⁹ *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70-71 per Brennan J

¹⁰ *Abebe v The Commonwealth* (1999) 197 CLR 510 at 560 per Gummow and Hayne JJ; *Enfield City Council v Development Assessment Commission* (2000) 199 CLR 135 at 157 per Gaudron J

¹¹ *Federal Commissioner of Taxation v Westraders Pty Ltd* (1980) 144 CLR 55 at 60 per Barwick CJ

¹² *Kingswell v The Queen* (1985) 159 CLR 264 at 300 per Deane J; *Krakover v The Queen* (1998) 194 CLR 202 at 224 per McHugh J

¹³ *Baker v Campbell* (1983) 153 CLR 52 at 71 per Gibbs CJ; *Corporate Affairs Commission v Yuill* (1991) 172 CLR 319 at 346 per McHugh J; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 161 per McHugh J

¹⁴ *Incorporated Council of Law Reporting (Q) v Federal Commissioner of Taxation* (1971) 125 CLR 659 at 672 per Windeyer J

¹⁵ *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 35 per Gibbs CJ

¹⁶ *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 239 per Brennan J; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 76 per Gaudron J

¹⁷ *R v Shrestha* (1991) 173 CLR 48 at 60 per Brennan and McHugh JJ; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 485 per Deane and Toohey JJ

All new legislation should be assessed for its consistency and compliance with the principles of the rule law.

Point 7 of the preamble states that the Legislative Assembly 'considers it is critical' that, amongst other things, 'the rule of law ... be preserved'.

In the draft Bill, detention orders are made by the Supreme Court on the application of a senior police officer.¹⁸ This enshrines the principal of judicial review of administrative action (the right to a fair trial, the separation of powers). The detention orders may be granted on the criteria set out in s 19. This section goes some way to decreasing the inherent arbitrariness of the exercise of discretion called for by the Bill.

One of the features of the rule of law is that citizens have the right to legal representation. Section 49 of the Bill protects that right, albeit with some caveats in relation to confidential communication between detainees and their lawyers. Under this section, a person who is detained under a preventative detention order may also contact legal aid for the purpose of attaining a lawyer.

The Australian Lawyers Alliance respectfully submits that the Legislative Assembly is actively attempting to uphold the rule of law in this Bill.

Objective criteria

The UN High Commissioner for Human Rights, Mary Robinson, recommended that the following criteria be met when attempting to strike the balance between protecting human rights and preventing terrorism:

- Use precise criteria;
- Not confer unfettered discretion on those charged with execution of the laws;
- Conform to the principle of proportionality;
- Respect the principle of non-discrimination;

¹⁸ Exposure Draft Terrorism (Extraordinary Temporary Powers) Bill 2005 (ACT), Authorised by the ACT Parliamentary Counsel s 17.

- Be compatible with the objects and purposes of human rights treaties and not impair the essence of any right; and
- Be necessary in a democratic society.¹⁹

How does the Bill measure up against these criteria?

- Use precise criteria

Section 6 of the Bill defines what is a terrorist act and, more importantly, what isn't - an act of advocacy, protest, dissent or industrial action.²⁰ Subsection 2(b) also stipulates that an act is not a terrorist act if it is not intended to do any of the following: cause serious physical harm to a person; cause death to a person; endanger the life of someone other than the person doing the act; and create a serious risk to the health or safety of the public.

The Australian Lawyers Alliance applauds this statutory recognition of the fact that acts of advocacy, protest, dissent or industrial action are not terrorist acts.

- Not confer unfettered discretion on those charged with execution of the laws

The draft Bill allows for preventative detention orders to be made (see Part 2) and provides for special powers of authorisation (see Part 3). For preventative detention orders to be made, a senior police officer must apply to the Supreme Court.²¹ For special powers authorisation orders to be made, the chief police officer must apply to the Supreme Court or the Magistrates Court.²² The judicial officer must be satisfied 'on reasonable grounds'²³ that the order is necessary. In other words, the discretion is bound by fairly precise criteria. This degree of

¹⁹ Charlesworth, H 'Human Rights in the wake of terrorism' (2003) *Reform* 82 at 28

²⁰ At point 18 s 6(2)(a)

²¹ *ibid* s 17

²² *ibid* s 61

²³ *ibid* s 19, s 63

judicial presence in the granting of such orders and the fettering of judicial discretion is a commendable virtue of the Bill.

- Conform to the principle of proportionality

Please see our submissions under the headings: 'We oppose the Bill' and 'How the Bill could be improved'. However, we believe that, in the detail of the Bill, the Assembly has striven to moderate the lack of proportionality that the very existence of the Bill represents.

- Respect the principle of non-discrimination

The provisions for the presence of an interpreter when necessary and for appropriate procedures to be followed where a person suffers from a disability should ensure a degree of non-discrimination.

- Be compatible with the objects and purposes of human rights treaties and not impair the essence of any right

Please see our submission under 'International Law'.

- Be necessary in a democratic society

Please see our submission under 'We oppose the Bill'.



WHO WE ARE

Background

The Australian Lawyers Alliance is the only national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of individuals. We have some 1,500 members and estimate that they represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. The Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

Corporate Structure

APLA Ltd, trading as the Australian Lawyers Alliance, is a company limited by guarantee that has branches in every state and territory of Australia. We are governed by a board of directors made up of representatives from around the country. This board is known as the National Council. Our members elect one director per branch. Directors serve a two-year term, with half the branches holding an election each year. The Council meets four times each year to set the policy and strategic direction for the organisation. The members also elect a president-elect, who serves a one-year term in that role and then becomes National President in the following year. The members in each branch elect their own state/territory committees annually. The elected office-bearers are supported by ten paid staff who are based in Sydney.

Funding

Our main source of funds is membership fees, with additional income generated by our events such as conferences and seminars, as well as through sponsorship, advertising, donations, investments, and conference and seminar paper sales. We receive no government funding.

Programs

We take an active role in contributing to the development of policy and legislation that will affect the rights of the injured and those disadvantaged through the negligence of others. The Lawyers Alliance is a leading national provider of Continuing Legal Education/Continuing Professional Development, with some 25 conferences and seminars planned for 2005. We host a variety of Special Interest Groups (SIGs) to promote the development of expertise in particular areas. SIGs also provide a focus for education, exchange of information, development of materials, events and networking. They cover areas such as workers' compensation, public liability, motor vehicle accidents, professional negligence and women's justice. We also maintain a database of expert witnesses and services for the benefit of our members and their clients. Our bi-monthly magazine *Precedent* is essential reading for lawyers and other professionals keen to keep up to date with developments in personal injury, medical negligence, public interest and other, related areas of the law.