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Privacy
Foundation**

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ACT Terrorism (Extraordinary Temporary Powers) Bill 2005

Submission by the Australian Privacy Foundation

About the Australian Privacy Foundation

1. The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. Relying entirely on volunteer effort, the Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. Since 1987 the Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions. For further information about the Foundation, see www.privacy.org.au.

General comments on the Bill

2. The Australian Privacy Foundation has no objections in principle to the review or updating of security laws to cope with new and emerging threats where the need to do so can be justified on the basis of empirical evidence or well argued intelligence hypotheses. The particular provisions must be necessary and an effective and proportionate response to the threat.

3. We accept that there is a threat of terrorism but do not believe it is any greater now than it was throughout the 1970s, 1980s and 1990s when groups such as the IRA, Red Brigades, ETA and Black September planned and carried out violent acts throughout the world in pursuit of political objectives. There is little empirical evidence to support the perception, fostered by governments and the media, that the security environment has changed dramatically as a result of terrorist incidents since the September 2001 attacks on the United States. Accordingly, we see no need for the proposed legislation.

4. Nevertheless, legislative change seems inevitable because the ACT Government is a party to the September 2005 agreement among the Commonwealth, State and Territory Governments to respond to the perceived threat by further increasing the powers of our law enforcement and national security agencies. Our immediate concern, then, is to limit and contain damage to the privacy rights of Australians.

5. We agree with the Chief Minister's observation, on presenting the exposure draft of the Bill to the Legislative Assembly, that the anti-terrorism laws passed by the Federal Parliament last month failed to adequately preserve and protect human rights.¹ We welcome the features of the Bill that demonstrate a commitment to address the many concerns within the community about the impact of control orders and preventative detention on human rights and principles of justice. In particular, we consider it necessary and appropriate that the 'extraordinary' and 'temporary' nature of the legislation is reinforced by the requirement that it be reviewed after three years and expire after five.

6. There are further safeguards that need to be incorporated into the legislation, to ensure that the powers conferred are used properly and that the community is able to determine whether the legislation is achieving its intended purpose. These are set out below.

Informing the person about why they have been detained

7. A person who is detained under a preventative detention order must be given a copy of the order as soon as possible after they are taken into custody (cl 44). Clause 22 sets out the contents of the order, but these do not include the reasons for which the order was made.

8. In addition, the detainee must be informed about the effect of the order (cl 41), including a number of specified matters such as their right to apply to the court to set aside or amend the order. However, again, these matters do not include an explanation of why the person was taken into custody. It would be difficult to prepare an application to set aside an order without knowing the basis on which it was issued.

9. If this is the correct reading of the Bill, we object strongly to a practice that does not permit people detained under preventative detention orders to know why they have been taken into custody. In any case, the Bill should make it clear that the detainee should normally be informed of the reasons why the order has been issued. Evidence should not be withheld unless specified circumstances apply, such as where revealing would defeat the purpose of the detention or place life at risk.

Informing detained people of their rights (cl 41)

10. As noted above, the Bill requires the police officer detaining the person to explain the implications of the order under which they are being detained. Furthermore, the person must be informed if the order is extended. Nevertheless, these requirements do not apply if the detainee's actions make compliance 'impracticable' (cl 43(1)). A failure to comply would not affect the lawfulness of the person's detention (cl 43(5)).

11. It is difficult to imagine how it is impracticable to convey information to a person who is held in custody. This provision creates the risk that an uncooperative detainee may be effectively 'punished' by not being informed of their rights. As a minimum, the police officer should be required to record the reasons why it was impracticable to provide the information.

¹ Legislative Assembly for the ACT: 2005 Week 15 Hansard (15 December) p.4931
<http://www.hansard.act.gov.au/hansard/2005/week15/4931.htm>

12. Because the powers being exercised are 'extraordinary', it is all the more necessary to ensure that the detainee is aware of their rights (such as the right to complain to the Ombudsman or apply to the Supreme Court to set aside the order). In our view, a contravention of the obligation to inform should affect the lawfulness of the person's detention.

Search of person taken into custody (cl 38)

13. The Bill permits searches of people taken into custody if the police officer reasonably suspects that the person is carrying evidence of, or relating to, a terrorist act. It then sets out rules, at Schedule 1, for searching persons taken into custody. This is appropriate, given the intrusiveness of the activity. However, a police officer does not need to comply with the rules if it is 'impracticable', as long as the reasons are recorded. This seems to be an unnecessarily weak standard of protection because the circumstances that make compliance impracticable can be caused by factors within the control of the police, such as poor planning or inadequate resourcing, as well as by factors beyond their control.

14. It would be better to specify the circumstances where non-compliance is permitted. For example, it might be permitted in circumstances where compliance would put the collection of the evidence at risk, endanger any person, or enable the person to escape from custody.

Monitoring of legal advice

15. A person who is held in custody under a preventative detention order has no right to contact anyone except as permitted by the legislation. Clause 49 permits them to contact a lawyer privately and at any time, unless they are prevented by a prohibited contact order. The contact must not be monitored by the police except as permitted by cl 53(2).

16. Where the contact is monitored, cl 53 (10) prohibits it from being recorded. To remove any doubt, it should be clarified that 'recorded' includes taking notes as well as audio or video recording.

Identification material

17. A police officer can collect identification material if the person consents in writing, or if the officer reasonably believes taking the material is necessary to confirm the person's identity (cl 56(2)). The material may be used only to decide whether the detained person is the person stated in the order (cl 57(1)).

18. Relying on consent is inappropriate in the circumstances. Because the material may be used only for confirming the person's identity, it should not be collected unless the police officer has decided that the collection is necessary for this purpose. The process of seeking 'consent' would have no meaning, as the collection is authorised by the legislation in any case. The detainee cannot prevent the collection by declining to agree. Their only choice is either to cooperate with the collection or have the material collected by force.

19. The legislation should instead set out rules for collecting identification material that require the person to be informed of why the material is being collected and what will happen to it, and what generally will happen to the information derived from the material. The person should also be informed of the authority that the police officer has to collect the information.

Public interest monitors

20. The Bill provides for lawyers with an 'appropriate security clearance' and the 'qualities and experience' that make them suitable for the role to be appointed as public interest monitors (cl 59). The role is not well developed, but it could be significant. The public interest monitor may attend hearings of applications to make, amend, set aside or extend preventative detention orders or prohibited contact orders (cl 15). At the hearing, they can ask questions and make submissions. A public interest monitor must also be consulted about proposed directions to monitor contact between a person and their lawyer (cl 53).

21. The public interest monitors do not represent the proposed detainee but, presumably, must reflect the public interest in preserving human rights. They may attempt to influence decisions made by the court or the police but they have no powers.

22. In our view, they should be required to report annually to the Legislative Assembly about their perceptions of how well the public interest is being considered and taken into account. The Bill currently, and appropriately, provides for the chief executive to report annually on the use and the effectiveness of the Act. Reports from the panel of public interest monitors would present a different perspective on the operation of the legislation.

23. In addition to having public interest monitors report annually, we consider that the ACT Human Rights Commissioner should be empowered and resourced to investigate any apparent inadequacies in the protection of human rights under this legislation, either as a result of reports from public interest monitors, or in response to issues identified in complaints to the Ombudsman or arising from court cases.

The need for maximum transparency and accountability

24. We welcome the requirement for the chief executive to report annually on the Act and consider that the reports should contribute to maximum transparency and accountability. The reports should provide an account of the reasons for the orders being issued, the number of people affected (including those incidentally affected through forcible entry into their homes) the number of false or erroneous actions under the Act, and as much other detail as possible, limited only by core police and security service operational issues such as the need to protect the identity of undercover agents and intelligence sources.

25. Wherever possible, freedom of information rights, freedom of the press, the ability to seek judicial review of decisions, and other checks and controls on the exercise of power that are normally available to people affected by government actions should be retained.

Inter-jurisdictional issues

26. While all Australian governments have pledged to work cooperatively in countering the threat of terrorism, the ACT is alone in having a statutory bill of rights and its proposed terrorism legislation will provide a higher standard of protection in some respects than in other jurisdictions.

27. It is not apparent from the text of the Bill whether a person who has been detained under a preventative detention order may be extradited to another jurisdiction. Should this occur, there may be a risk that their rights will be circumscribed as a result. If so, the Bill should require that any decision about

extradition should ensure that, in the circumstances, the rights of the individual are not diminished.

Conclusion

28. The Bill addresses many of the concerns that the Federal Government failed to consider when developing its counter terrorism legislation. We consider that further changes to improve accountability and transparency, both to the individuals affected and the community generally, are necessary to ensure that human rights are adequately protected.

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