

AFP submission to ACT Standing Committee on Legal Affairs Inquiry into the Exposure Draft *Terrorism (Extraordinary Temporary Powers) Bill 2005 (ACT)*

The Australian Federal Police (AFP) welcomes the opportunity to provide the ACT Legislative Assembly's Standing Committee on Legal Affairs (the Committee) with information relevant to its inquiry into the *Terrorism (Extraordinary Temporary Powers) Bill 2005 (ACT)* (the Bill).

Role of the AFP

The AFP is the primary instrument of Commonwealth law enforcement. Its role is to enforce Commonwealth criminal law and protect Commonwealth and national interests from crime in Australia and overseas.

The AFP's functions are set out in section 8 of the *Australian Federal Police Act 1979* (AFP Act). Within that framework, the AFP is to pursue clearly defined outcomes agreed by the Government. The outcomes currently agreed for the AFP are:

- Outcome 1: The investigation and prevention of crime against the Commonwealth and protection of Commonwealth interests in Australia and overseas; and
- Outcome 2: Policing creates a safe and secure environment in the ACT (funding for this Outcome is provided by the ACT Government).

Under section 37(2) of the AFP Act, a Ministerial Direction outlines the Government's priorities and expectations for the AFP for a given period, including:

- preventing, countering and investigating terrorism under Commonwealth legislation;
- providing protective security services to high office holders and physical establishments and entities of specific interest to the Commonwealth, witnesses and special events;
- providing for the security of Australian air travellers and the aviation industry through the deployment of Air Security Officers on selected domestic and international flights and through the provision of a preventative and intelligence-driven Counter-Terrorist First Response capacity at major Australian airports; and
- providing community policing services in the ACT, Jervis Bay and external territories;

In addition, following the passage of the *Australian Federal Police and Other Legislation Bill 2004*, the AFP incorporated the former Australian Protective Service (APS) into the AFP from 1 July 2004. The specific protective and custodial functions designated for the APS are set out in a separate Ministerial Direction issued pursuant to sections 8A and 8(1)(be) of the AFP Act.

The AFP plays a large part in Australia's international role in counter-terrorism and has a significant involvement in national counter terrorism arrangements, particularly through a range of governance mechanisms including the National Counter Terrorism Committee (NCTC).

Central to the AFP's domestic counter terrorism efforts are the eleven Joint Counter Terrorism Teams (JCTTs) stationed throughout Australia including in the ACT, which are

made up of State and Territory police representatives. These teams work closely with other domestic agencies, the intelligence community and international partners to identify and investigate any activities in Australia which may be linked to terrorism.

Internally within AFP the Intelligence, Forensic and Technical (including the Australia Bomb Data Centre), Protection and Counter-Terrorism portfolios have prominent roles in prevention and response to domestic terrorism activity.

AFP Comments on the Exposure draft of the Bill

The AFP recognises that the Bill implements the ACT Government's commitment at the 27 September 2005 Council of Australian Governments (COAG) meeting to introduce legislation to provide for preventative detention and stop, search and seizure powers to enable police to prevent and investigate terrorist attacks

The AFP's dual role in the ACT of preventing, countering and investigating terrorism under Commonwealth legislation and providing community policing services in the ACT is the basis for the following comments on the Bill. In order to provide the best protection to the ACT community and to be able to work as effectively as possible with other Australian police services in preventing and investigating terrorist activity, the ACT Bill needs to be as compatible as possible with the legislation of the Commonwealth, the States and the Northern Territory. The current Bill may impede the interoperability of the ACT Policing element of the AFP with the rest of the AFP and other jurisdictions in conducting counter-terrorism operations.

Comments on specific sections of the Bill

Section 11 No preventative detention orders for children

The Commonwealth and other State and Territory laws on preventative detention provided for preventative detention for persons aged 16 years and over. The Bill, however, excludes preventative detention of children without clearly defining who is a child. The AFP believes that this needs to be clarified and would support the adoption of an approach similar to the Commonwealth.

Section 17 Applying for preventative detention order

The test established by section 17 (3) for a senior police officer to apply for a preventative detention order is:

...if the senior police officer –

(a) suspects, on reasonable grounds, that the person –

- (i) intends, and has the capacity, to carry out a terrorist act; or
- (ii) possesses something connected with the preparation for, or carrying out of, a terrorist act; or
- (iii) has done an act in preparation for, or planning, a terrorist act; and

(b) is satisfied on reasonable grounds –

that it is reasonable and necessary to detain the person to prevent a terrorist act; and

- (i) that detaining the person under the order is the least restrictive way of preventing the terrorist act mentioned in subparagraph (i); and
- (ii) that detaining the person for the period for which the person is to be detained under the order is reasonable and necessary to prevent the terrorist act.

This test is different to that used in the Commonwealth and NSW legislation (s105.4(4) *Criminal Code Act 1995 (Cth)*):

...if the person is satisfied that:

- (a) there are reasonable grounds to suspect that the subject:
 - (i) will engage in a terrorist act; or
 - (ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or;
 - (iii) has done an act in preparation for, or planning, a terrorist act; and
- (b) making the order would substantially assist in preventing a terrorist act occurring; and
- (c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).

While these are both reasonable suspicion tests designed to balance operational law enforcement needs with the protection of individual rights, the differences between s17(3) in the Bill and s105.4(4) in the Commonwealth Criminal Code may cause difficulties operationally for the AFP. The difference of particular concern to the AFP is s17(3)(b)(i) in the Bill which appears to complicate the test for applying for a preventative detention order by adding an additional element that is not in the Commonwealth test. This additional element is open to broad interpretation which does not provide the certainty necessary for preventing or investigating terrorist attacks.

Similarly, the test for the ACT Supreme Court to make a preventative detention order is different to the test for Commonwealth issuing authorities and the NSW Supreme Court. Section 19(4) requires that the Court be satisfied, on reasonable grounds of the test in section 17(3), whereas the Commonwealth and NSW tests only require the issuing authority or Court to be satisfied of these matters.

AFP members must be conscious of jurisdictional differences while undertaking their duties and are trained appropriately to operate this way, however, in such a critical situation as an imminent terrorist act where these powers could be deployed the AFP strongly recommends that the two sets of legislation should be as similar as possible.

References to torture in sections 18 application for preventative detention order, section 29 prohibited contact orders, and 93 evidence obtained from torture inadmissible

Australian Governments and their officials comply with Australia's obligations under the United Nations Convention against Torture. Acts constituting torture and other cruel, inhuman or degrading treatment or punishment are a criminal offence and/or civil wrong in all

Australian jurisdictions. Similarly, evidence obtained using torture and other cruel treatment is inadmissible in Australian court proceedings. Further, specialist statutory authorities, such as Human Rights and Equal Opportunity Commission and federal, State and Territory ombudsmen, are empowered to monitor and investigate the conduct of public officials. In the case of policing in the ACT this includes the ACT Human Rights and Discrimination Commissioner.

Against this background, the AFP is concerned about the potential for references to torture in the Bill made at section 18 (1) (f), section 29 (4)(d), and section 93 to be misinterpreted to suggest that police in the ACT resort to illegal means to obtain evidence. This is incorrect and could contribute to a lack of public confidence in police methodology when it comes to counter-terrorism investigations. The AFP believes that the existing legal framework provides adequate protection against the use of information obtained using torture.

Section 28 Setting aside or amending preventative detention orders & Section 85 Compensation for exercise of special powers

The AFP is concerned about the provisions in section 28 (5) and section 85 providing specifically for compensation in relation to the exercise by police of their preventative detention and special powers being misinterpreted. The AFP acknowledges that similar provisions are provided for in the Commonwealth Criminal Code at section 105.51 for preventative detention under Commonwealth law and that the Commonwealth parliament has established specific compensation provisions in other areas of the criminal law, for example section 3M of the *Crimes Act 1914* in relation to the collection of electronic evidence under search warrant. Without adequate explanation of the policy reasons for providing this specific basis for compensation in relation to the proposed preventative detention scheme for the ACT, these provisions could undermine the careful and precautionary stance that police must take in interdicting and preventing terrorism. The AFP recommends that this be addressed in the Bill's explanatory statement.

Section 38 Search of person taken into custody under preventative detention order

The test in the Bill for the frisk searching of a person who is taken into custody under a preventative detention for evidence of terrorist acts is different to the test in the Commonwealth Criminal Code.

The Bill proposes at s38(3) that:

However, the police officer must not conduct a frisk search or ordinary search of the person for evidence of, or relating to, a terrorist act unless the officer suspects, on reasonable grounds that the person is carrying evidence of, or relating to, a terrorist act.

The Commonwealth test for frisk searching in this context for evidence of terrorist acts is that a police officer who takes the person into custody or is present when they are taken in to custody may conduct the search "...if the police officer suspects on reasonable grounds that it is prudent to do so in order to ascertain whether the person is carrying any seizable items.." (section 105.23).

In situation as potentially critical as taking a person in custody under a preventative detention order, the AFP recommends that the two sets of legislation should be as similar as possible.

Section 43 Compliance with obligation to inform

The obligation in the Bill for an AFP officer to explain the effect of a preventative detention order to a detainee contains an additional requirement to the Commonwealth Criminal Code.

The Bill proposes at s43(4) that:

...the assistance of the interpreter may be provided by telephone if –

(a) the detained person agrees; or

(b) it is not practicable to arrange for the interpreter to attend in person.

The Criminal Code provides that “...the assistance of the interpreter may be provided by telephone” (section 105.31(4)). To ensure greater compatibility between the Commonwealth and the ACT preventative detention systems, the AFP believes that the ACT provision should be the same as the Commonwealth provision.

Section 40 Detention arrangements

Section 40(4) requires that the written arrangements to be prepared by the Chief Police Officer of the ACT in relation to the detention of people under preventative detention orders requires the identification of the places in the ACT where detainees may be detained. The Act requires these arrangements to be provided to the Human Rights Commissioner and the ACT Ombudsman. What is not clear from the Bill is whether appropriate safeguards will be in place to protect that information. The security requirements for holding people in preventative detention include protecting the potential location of where detainees may be held. This is distinct from the other requirements of detention such as the minimum conditions of detention and standards of treatment for detainees.

The Commonwealth legislation does not require the listing of the potential location of detainees. Instead a Protocol governing the minimum conditions of detention and standards of treatment applicable to any person detained under a preventative detention order will be developed by the Australian Federal Police in consultation with the Commonwealth Ombudsman and the Inspector-General for Intelligence and Security.

The AFP believes that the requirements proposed to be established by section 40(4) of the Bill should be the same as the Commonwealth protocol and should not include the listing of the potential location of detainees. If the ACT requirements were the same the Commonwealth protocol, the guideline proposed under section 40(4) could be made publicly available.

Section 47 Contact with family members

This section allows for detainees to contact family members and others to inform them that they are being detained. Here the Bill goes further than the NSW and, South Australian legislation and the Western Australian Bill by allowing contact with family and others for the duration of the preventative detention order unless prevented by a prohibited contact order. The ACT Bill provides for the contact to take place under conditions set by the preventative detention order. The Victorian Bill has similar provisions to the ACT Bill and provides some detail on how that contact can take place – in the form of visits or contact by telephone, fax or email.

The security requirements of providing for additional contact between the detainee and family members for the duration of a preventative detention order in the context of acting to prevent

terrorist acts or to collect evidence after the commission of terrorist acts will need to be balanced against the obligations on police to treat the detainee humanely by providing for this contact. Without provision in the ACT Bill for transparently establishing how the parameters of this contact can be established, for example through guidelines issued by the Chief Police Officer, this may prove to be very difficult to implement.

Section 49 Contact with lawyer

The Commonwealth and NSW provisions in relation to the contact allowable between a detainee and a lawyer limit that contact to matters relevant directly to their detention. Section 49(9) allows the detainee to have reasonable contact with a lawyer for other purposes. Although section 53 of the Bill provides for the monitoring of contact between a detainee and their lawyer, but only if a senior police officer has a reasonable belief that there may be a range of detrimental consequences if the contact is not monitored. This is a very stringent test to apply in the context of action being taken to prevent or respond to terrorist acts.

This approach, from a security perspective, greatly concerns the AFP that such contact could be used to compromise counter-terrorism operations or put the community at risk. The AFP prefers the Commonwealth and NSW approach which limits the contact between a detainee and their lawyer to seeking and receiving legal advice in relation to their detention and provides for the mandatory monitoring of that contact.

Section 90 Human rights training

The AFP acknowledges the importance of police being appropriately training in the use of all powers that they can exercise and in particular the importance of that training incorporating the human rights obligations that police have when exercising those powers. The AFP currently provides such training for ACT Policing officers and will provide similar appropriate training for the powers proposed in this Bill. This training will meet the obligation placed on the Chief Police Officer in this section.

Other issues

Protection of information used for applying for and making preventative detention orders

The Bill is silent on the protection of information used by police to apply for preventative detention and prohibited contact orders. For example, there is no reference to the Court's powers to close Court proceedings and restrict publication of court proceedings in relation to preventative detention orders. There is also no provision in the Bill, as there is in the Commonwealth Criminal Code (sections 105.7(2A), 105.8(6A), 105.11(3A), 105.12(6A), 105.52(4), and 105.52(6)), to protect national security information that may be used by police

The AFP strongly believes that it is important that the Court protect information used in proceedings for preventative detention as its public release may adversely compromise national security and the security of individuals or groups identified during the proceedings. The AFP believes that the NSW legislation provides a suitable model for closing court proceedings and restricting the publication of those proceedings at section 26P:

26P Closure of Court and restriction on publication of proceedings

- (1) This section applies to proceedings before the Supreme Court in connection with an application for the making or revocation of a preventative detention order or prohibited contact order.
- (2) Any such proceedings must be heard in the absence of the public.
- (3) The Supreme Court may, in connection with any such proceedings, make such orders relating to the suppression of publication of the whole or any part of the proceedings or of the evidence given in the proceedings as, in its opinion, are necessary to secure the object of this Part.
- (4) A person must not disclose information knowing that the disclosure contravenes an order under subsection (3).

Maximum penalty: Imprisonment for 5 years.