



**Submission to the Legislative Assembly for the Australian Capital Territory
Standing Committee for Legal Affairs**

**Inquiry into the Exposure Draft Terrorism (Extraordinary Temporary
Powers) Bill 2005 (ACT)**

Introduction

1. Australian Lawyers for Human Rights (ALHR) welcomes the opportunity to make submissions on the Exposure Draft *Terrorism (Extraordinary Temporary Powers) Bill 2005 (ACT)*. ALHR has previously made [Submission No. 139](#) to the Senate Legal and Constitutional Affairs Committee inquiry into the *Anti-Terrorism Bill (No 2) 2005* and has also made submissions to the New South Wales and Queensland Governments on complementary State counter-terrorism legislation in late 2005. An executive summary of that submission is attached at Appendix A. ALHR believes that the Commonwealth Bill has far-reaching negative implications for the human rights of Australians.

ALHR

2. Australian Lawyers for Human Rights (ALHR) was established in 1993, and incorporated as an association in NSW in 1998 (ABN 76 329 114 323).
3. ALHR is a network of Australian lawyers active in practising and promoting awareness of international human rights standards in Australia. ALHR has a national membership of about 1200 people, with active National, State and Territory committees, including the ACT.
4. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

Overview of concerns

5. ALHR overall opposes the *Terrorism (Extraordinary Temporary Powers) Bill 2005* (ACT) (hereafter, ‘the Bill’) on the basis that it permits the removal of a person’s liberty without criminal charge or conviction which is inconsistent with Australia’s obligations as a party to the International Covenant on Civil and Political Rights (ICCPR).
6. A substantial difficulty in determining the appropriateness of the provisions of this Bill from a human rights perspective is the absence of detailed reasons by the Commonwealth Government for the new measures contained in the Bill. This is important not just to know as the base reason for the new laws but also in judging whether the new laws are proportionate in their impact on human rights.
7. ALHR remains concerned that the case has not been established by either the Federal Government or the ACT Legislative Assembly as to the need for such laws. However many safeguards are added, the idea of preventative detention remains anathema to the basic principle that a person will not be detained by the State in the absence of a criminal case proved by a fair trial. The ACT legislation will act in concert with the new Federal legislation and the Division III ASIO powers which in ALHR’s view remain deeply flawed.
8. ALHR acknowledges that the ACT Legislative Assembly has taken every effort to include in the Bill important human rights safeguards that are not found in the *Anti-Terrorism Bill (No 2) 2005* (the Federal Bill) or other State Bills. In particular, ALHR welcomes the following measures which were also outlined in a media release by the Chief Minister on 15 December 2005:
 - Full judicial review and oversight of preventative detention orders (‘PDOs’) and special powers by the ACT Supreme Court (although this may still raise some constitutional issues as discussed below)
 - Higher threshold test for making preventative detention orders
 - Prohibition on the admissibility of evidence obtained from torture
 - 24 hour interim orders, 7 day continuing orders
 - Clear prohibition on rolling orders

- Order lapses when detainees questioned by ASIO
- Grounds for seeking a review not limited
- Court ordered compensation for wrongful detention
- Presumption of confidential legal communications, although the presumption can still be displaced which is discussed below
- Legal aid
- Full explanation of rights to person subject to the PDO
- Prohibition on the detention of children
- Additional safeguards during detention: the exposure draft includes important safeguards in relation to the detention of persons, including a requirement to develop protocols on the humane treatment of detainees. Additional safeguards for children and persons with impaired decision-making ability who are in the care of the person subject to a detention application are welcome.
- No disclosure offences
- Location of detainees within ACT facilities
- Court control over their own proceedings
- Transparency and full disclosure senior police officer in application process:
- Establishment and role of the Public Interest Monitor and panel
- Annual reports to the Legislative Assembly on the use and effectiveness of the legislation
- Human rights compliant strip search provisions
- Proportionate and clear use of force provision when police carrying out preventative detention order
- In relation to the Special Powers provisions, ALHR welcome the requirements that all police who exercise stop, search and seizure powers

must undergo human rights training, and all police must keep records in relation to their use of the stop, search and seizure powers.

- Five year sunset clause, although ALHR would recommend a 1 year sunset clause.
9. While ALHR may differ to the ACT Government on the need and basic thrust of the legislation, to be constructive we have focused on ways in which the proposed legislation may be amended without unduly affecting its efficacy but to the greatest extent possible further protect human rights.
 10. The ACT Chief Minister is to be commended for releasing an earlier draft of the Federal Bill and for seeking comprehensive advice on the human rights implications of the Federal legislation from experts. Such laws should only be enacted after careful consideration of the requirements of international human rights law. Like many other organisations ALHR had only one week in which to form our position for the Senate inquiry on the Federal Bill as introduced. That time was entirely inadequate to properly assess the ramifications of the Federal Bill for human rights because the provisions of the Federal Bill profoundly affect so many human rights. The longer time-frame for this ACT inquiry is therefore welcome.

International Law Framework

11. The standard against which the new measures are to be judged is the International Covenant on Civil and Political Rights (ICCPR). Australia ratified the Covenant but has yet to specifically incorporate it into domestic law. Nonetheless Australia by accession has agreed to be bound by its terms at international law. If Australia breaches the ICCPR, affected Australians denied a domestic remedy can complain to the UN Human Rights Committee.
12. The United Nations has specifically condemned terrorism and exhorted member states to take appropriate measures to counter terrorism. Importantly, however, counter-terrorism measures cannot be at the expense of international

human rights. Specifically, the Security Council in Resolution 1456 on 20 January 2003 resolved as follows:¹

“6. States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and international humanitarian law;”

13. Human rights do not exist in a vacuum but must interact with other rights. The rights enshrined in the ICCPR must be respected at all times, unless derogation is effected in accordance with Article 4 of the ICCPR. Article 4 states that:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, 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.

14. The Federal Government has not expressed their reasons for saying Australia is in a state of emergency. In his judgment in *A v. Secretary of State for the Home Department*, Lord Hoffman asked whether a war or public emergency existed that threatened the life of the nation. His answer was ‘no’. He said:

I am willing to accept that credible evidence of [terrorist] plots exist...

I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda.²

15. The limits placed on human rights are strictly policed because of the fundamental nature of the rights concerned. Accordingly, human rights do not yield unnecessarily to laws passed by a democratic parliament. If a government makes laws which prima facie infringe a human right then, in the application of human rights jurisprudence, that law will be judged consistent with the principle of proportionality.

16. The General Comment from the Human Rights Committee on Article 9 states:

¹ Resolution 1456 (2003) Adopted by the Security Council at its 4688th meeting on 20 January 2003. See also resolutions of the UN Commission on Human Rights 2003/37 of 23 April 2003 and 2003/68 of 25 April 2003.

² UKHL 71 [2005]

...if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted.³

17. The 'exigencies of the situation' under Article 4, and arbitrariness of detention under Article 9 will be judged by tests of reasonableness and proportionality. The principle of proportionality is well known and established in human rights jurisprudence both internationally and in domestic law of the UK and Canada. The United Kingdom Joint Committee on Human Rights is a Parliamentary Committee established to consider 'matters relating to human rights in the United Kingdom' and to consider remedial orders to be made under the United Kingdom's Human Rights Act. 1998.
18. The United Kingdom Joint Committee on Human Rights, in a review of criminal laws, said that the following factors are relevant in considering whether a measure is proportionate:
 - (a) an interference in rights must not take away the very essence of a right;
 - (b) there must be a sufficient factual basis for believing that there was a real danger to the interest which the State claims there was a pressing social need to protect;
 - (c) the State's measure or act must interfere with the right in question no more than is reasonably necessary in order to achieve the legitimate aim;
 - (d) measures are likely to be regarded as disproportionate if they impose heavy burdens on one individual or group, apparently arbitrarily, in order to achieve a social benefit, or if they impose measures which appear to be excessive in relation to the circumstances to which they relate;

³ ICCPR General Comment 8 (Sixteenth session, 1982): Article 9: Right to Liberty and Security of Persons, A/37/40 (1982) 95 at paras. 1-4.

(e) the effectiveness of any legal controls over the measures in question, and the adequacy of compensation or legal remedies for those affected by the measures, will be relevant to the proportionality of any interference.⁴

19. . The comments which appear below analyse the provisions of the ACT Bill from the point of view of human rights standards applying the principle of proportionality. As the Standing Committee will see that process is hampered by the lack of a clear and detailed statement from the Commonwealth Government as to the need for the measures proposed. The ACT Legislative Assembly must also articulate clearly and convincingly the need for these laws.

Comments on Specific Provisions

Preventative Detention Orders (Part 2)

20. The Commonwealth *Anti-Terrorism Bill (No 2) 2005* passed in December institutes a regime of executive preventative detention. A person may be detained for up to 48 hours. An order by a police officer of the rank of superintendent or above may be made for detention for up to 24 hours (“initial preventative detention order”). Then a person, called an “issuing authority”, may extend the initial order by up to a further 24 hours (a “continuing preventative detention order”). Persons who may be an issuing authority are Federal Court judges or Federal magistrates, retired judges from the States or the AAT President acting in their personal capacity.

21. The ACT Bill provides for 14 days preventative detention to follow on from this new Commonwealth power as agreed at COAG in September 2005.

Basis for Detention

22. The ACT Bill states that the object of the preventative detention order is to prevent an ‘imminent’ terrorist act occurring (expected to happen within 14 days) or to preserve evidence relating to a terrorist act that has already taken place within the previous 28 days.

⁴ As defined by the Joint Committee on Human Rights, United Kingdom, First Report of the Joint Committee on Human Rights, Annex 2, Session 2000-01, Criminal Justice and Police Bill UK, 26 April 2001.

23. In order for senior police officer to apply for a preventative detention order under clause 17, he or she must be satisfied that there are “reasonable grounds to suspect” that the subject:
- intends or has the capacity to carry out a terrorist act;
 - possesses something connected to a terrorist act; or
 - has done an act in preparation or planning for a terrorist act.
24. The order must substantially assist and be the least restrictive way of preventing a terrorist act and the detention must be reasonably necessary for that purpose. The terrorist act must be expected to occur within 14 days.
25. In addition, a detention order may also be made where it is necessary to detain a subject to preserve evidence relating to a terrorist act which has occurred in the last 28 days and detention is necessary for that purpose.
26. It is a valuable amendment in the ACT Bill that the police may only apply for, and the Courts may only make, a preventative detention order on the basis that it is the least restrictive means in some circumstance, and the only effective means in other circumstances, to achieve the purpose of the order.
27. ALHR does not agree that a PDO will be proportionate where it may be obtained on the basis merely that a person has “the capacity to carry out a terrorist act”. There is a clear connection between the other tests in clause 17 and the imminence of a terrorist act. It is difficult to envisage a case where a person who has not indicated an intention, does not possess anything connected to a terrorist act or has not been involved in an act of preparation or planning will undertake a terrorist act. The danger of such a provision remains that persons with respect to whom there is no evidence of being potentially being involved in a terrorist act will be caught by the provision. One can imagine all persons connected with a specific mosque being subject to such orders without there being more evidence than that they can carry an object in a back-pack or a car. This is a dangerous clause because of its width. The other provisions allow for persons who possess explosives of any description to be subject to a PDO and, in that way, the public may be protected.

28. ALHR would urge the further amendment that an attack must be reasonably expected to occur within 14 days. This would allow the intelligence on which the decision is made to be qualitatively evaluated by the court. ALHR also believes that the onus of proof for the court to be satisfied of the relevant grounds for the interim order under clause 19(4) should be as high as possible, at least the ‘comfortable satisfaction’ or the Briginshaw test. A higher threshold is more appropriate to a PDO.

29. A higher standard of proof should also apply to prohibited contact orders.

30. Given the broad scope of the preparatory and inchoate offences relating to terrorism in the Commonwealth Criminal Code, it is not clear to ALHR how police could have held a belief on reasonable grounds about the matters set out in subclause 17(3) and yet not be able to mount a criminal prosecution. Australians expect certain things from our criminal justice system: that a person can only be arrested if reasonably suspected of committing an offence, or preparing to commit one. This is a basic right that has arisen from a long legal tradition.

31. In contrast, this Bill reflects an intelligence-led response to ‘home grown’ terrorism. The purpose of preventative detention is to prevent an act of terrorism and to preserve evidence, not criminal prosecution per se. In contrast, under the UK counter-terror legislation, UK police must attempt to bring a criminal prosecution against a person subject to a control order.⁵

32. The use of intelligence for preventative detention orders where there is insufficient evidence to bring a criminal charge or as an alternative to prosecution is a fundamental change to Australia’s criminal justice system.

33. As Hugh White, former Director of the Australian Strategic Policy Institute, puts it:

the laws as drafted have much wider reach. They appear to allow the Government to detain people who are not and have never been - so far as anyone knows - involved in terrorist planning or training, on the grounds that police or ASIO believe that they might become terrorists in the future.

⁵ Article 8, *Prevention of Terrorism Act 2005* (UK).

But how could they tell that? How far would they cast this new net? And why can't adequate powers to fight terrorism be provided more simply and safely by the normal processes of criminal justice? 6

34. There has not been sustained analysis of the operational implications arising from a cooperative ACT-Commonwealth approach to counter-terrorism contained in the ACT Bill and new federal legislation. The use of intelligence information in forming a reasonable suspicion that the police can then act upon has not yet received in-depth analysis that it deserves.

Constitutional Issues

35. A preventative detention order can only be made by the ACT Supreme Court under this Bill. Under Part III of the Bill declaration of special powers authorisation and special investigative powers authorisations are also made by the Supreme Court. This raises the question of whether a judicial officer should properly authorise what is in essence an executive detention or action. It is possible that ordering the detention of a person without the proper judgment of criminal guilt would be found by the High Court to be incompatible with the proper judicial function as set out in the case of *Kable v DPP (NSW)* (1996) 189 CLR 51
36. It is not clear to ALHR why the ACT as a creature of the Commonwealth should not be caught by the same Constitutional issues as the Commonwealth in this regard. Stephen Gageler's constitutional advice to the Chief Minister makes this point clear at paragraph 6 on page 4. Further advice on this point should be sought.

Contact Issues

37. The ACT Bill still allows for prohibited contact orders although communication by detainees with a lawyer and family has been greatly relaxed from the federal model.
38. Of particular concern to ALHR is that a senior police officer can decide that contact with a lawyer should be monitored on a series of grounds set out in

6 Hugh White, 'Tell us the how, not just the why of new laws', *Sydney Morning Herald*, 31 October 2005.

subclause 53(2). Communications between lawyer and detainee must be in English for this purpose (unless an interpreter is available).

39. The privileged and confidential nature of communications with a lawyer is a necessary concomitant of the right to a fair trial (Art 14(3)). It is well recognised in Australian common law and also in human rights jurisprudence that access to a lawyer allows for the proper presentation of a client's case to a court. The reason is clear. If the content of the communications with a lawyer are provided to the other side then the person being represented will not be able to freely and completely seek the advice of the lawyer concerned. This in fact may hamper the ability of a court to resolve the matter whether in the prosecution's favour or not.
40. There should be no monitoring of communications between lawyers and their clients.
41. This position is supported by the Commonwealth Senate Legal and Constitutional Committee: see recommendation 13. ALHR submits that the compromise suggested by the Commonwealth Senate Legal and Constitutional Committee in recommendation 14 should only be allowed by order of the ACT Supreme Court upon the Court being satisfied beyond reasonable doubt that the communication will interfere with the purpose of the order.
42. At the very least, there should be no use of the information, or any derivative information, obtained from the communications against the person or other persons in proceedings.
43. It must be remembered that detainees are not persons suspected of having committed an offence and so therefore the safeguards for such persons should be greater than those charged with offences, not less.

Interactions with other laws

44. ALHR believe a full examination of how the ACT Bill will interact with the Commonwealth legislation is necessary.
45. ALHR notes that this Bill when tabled will be the subject of a compatibility statement by the Attorney General under section 37 of the ACT Human Rights Act 2004. ALHR therefore assume the Attorney-General will take the advice

of the ACT Human Rights Office in relation to the Bill. ALHR stand ready to contribute further analysis on the compatibility of the final draft of the Bill with the Human Rights Act when the Bill is tabled.

Conclusion

46. While the great care that the ACT Government has taken in constructing this legislation to be in accordance with human rights principles is appreciated and acknowledged by ALHR, we cannot support the detention of a person without a proper criminal trial. In our view, the case for the introduction of such an extreme measure as preventative detention has not been made out.

47. If the Bill goes ahead, ALHR strongly urge the raising of the onus of proof for the court to issue a preventative detention order or prohibited contact order to the standard of beyond reasonable doubt, and the amendment of clause 53 dealing with the monitoring of communication between client and lawyer.

Amy Kilpatrick
ACT Coordinator

Simeon Beckett
President
Australian Lawyers for Human Rights
20 January 2005

Appendix A – Executive Summary



Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Anti-Terrorism Bill (No 2) 2005

Executive Summary

1. The *Anti-Terrorism Bill (No 2) 2005* introduces laws which will strike at the heart of some fundamental human rights that Australians have come to value as part of life in a democratic society. The Bill proposes laws which will allow for executive rather than judicial detention based not on evidence but on suspicion. The Bill allows for control orders to be placed on people not because they have been convicted of any offence but on the basis of suspicion that a person has trained with a terrorist organisation or that the control order will assist in prevention of a terrorist act. The Bill introduces retrospective criminal offences and new sedition laws the breadth of which will damage the freedom of expression upon which any true democracy relies.
2. The Bill breaches a number of international human rights standards codified in the *International Covenant on Civil and Political Rights* and long honoured in Australian common law. The Bill abrogates a number of well understood rights including the right to a fair trial, the right to liberty, the freedom of association and movement, the right to family life and the rights of children at international law.
3. There has been little opportunity to properly and rigorously assess the proposed laws and their ramifications for human rights because,
 - the Bill has been kept from the public until its introduction in to the House of Representatives some 10 days ago;

- the government has not released detailed reasons for the proposed laws; and
- the haste with which this Committee (and indirectly the public) must consider this complex Bill.

Retrospectivity

4. The Bill proposes to make those offences amended in the *Anti-Terrorism Act 2005* retrospective in their operation back to the commencement of the provisions which were thereby amended. Retrospective criminal laws are abhorrent to human rights law and, before now, to Australian legislators.

Control Orders

5. Control orders are proposed as a way to effectively convert suspicion by the police (or security agencies) that a person will be involved in terrorism into a coercive tool previously unknown in Australia. Control orders are not based on evidence that a person has committed an offence but rather on a suspicion that they will. It is a power unknown with respect to even those who have been convicted of murder in Australia.
6. The manner with which the control orders are imposed breach in a fundamental way the right to a fair trial. Control orders are obtained on an *ex parte* basis subject to confirmation at an undisclosed date when there is no good reason for making the procedure *ex parte*. Despite the outcome of a control order being similar to conviction for a criminal offence the standard of proof is merely the civil standard. Also a fair trial is further delayed because the person is not supplied with evidence behind the original order.

Preventative Detention

7. Preventative detention orders allow for executive detention without merits review by a court. The orders are made by the police or an issuing authority who is not a court. These orders are fundamentally different to current arrest powers because the person concerned is not charged and is not taken before a court. They represent a major expansion of police powers. It is contrary to

both a person's right to liberty and right to a fair trial. No provision is made for the person to properly challenge in court the basis upon which he or she has been detained.

8. Once detained the person is presumed, by the terms of the legislation, to attempt to compromise the investigation or national security. Communication with family members, lawyers and the media is severely curtailed in breach of the rights to a fair trial, the right to family life and freedom of expression. These restrictions are even more extraordinary when one considers the people concerned are not suspected of having committed any criminal offence. Indeed the power of detention is available to preserve evidence of a terrorist act.

Sedition

9. The proposed sedition laws will be, like the existing sedition laws, extremely contentious because they are aimed at criminalising expression of opinion. The proposed provisions of s.80.2, typified by s.80.2(7) and (8), are so widely drafted that many journalists, artists, cartoonists and others working in similar areas are concerned that their work may be caught by such laws. It is this legitimate concern rather than actual prosecution which may wreak havoc with the ICCPR freedom of expression. The defence proposed is far too narrowly drawn to protect reportage or legitimate dissent in other than the narrow categories set out in the defence of good faith.

13 November 2005