



ACT DEPARTMENT OF JUSTICE
& COMMUNITY SAFETY

The Hon John Dowd
President
IJC Australia
GPO Box 173
SYDNEY NSW 2001

Dear Mr Dowd

Please find attached my submission on behalf of the Attorney-General for the Eminent Jurists Panel on Australia's counter-terrorism measures in Sydney on 14-15 March 20.

The submission seeks to address the issues raised by Ms Elizabeth Evatt AC in her email of 22 February 2006. As you may appreciate, a number of those issues do not have direct relevance to the Australian Capital Territory given its position vis-à-vis the Commonwealth.

I trust that you find the submission useful and look forward to appearing before the Panel on the afternoon of 14 March 2006.

Yours sincerely

Renée Leon
Chief Executive
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March 2006

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& COMMUNITY SAFETY

Purpose

The Australian Capital Territory Department of Justice and Community Safety welcomes the opportunity to address the International Commission of Jurists, Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights. The project is a timely inquiry into the precursors and responses to terrorism and the need to protect human rights in the process.

This submission focuses on recent laws introduced by the Commonwealth and the States and Territories dealing with detention to prevent terrorist acts and to preserve related evidence.

In the Australian Capital Territory (ACT) the focus is on the Terrorism (Extraordinary Temporary Powers) Bill 2005 that was released as an [Exposure Draft](#) in December 2005 and is expected to be introduced into the ACT Legislative Assembly in March 2006.

Human Rights Law

The ACT is the only Australian jurisdiction to incorporate human rights into domestic law.

The *Human Rights Act 2004* (HRA) came into force on 1 July 2004. From then, most of the individual civil and political rights that are guaranteed under the *International Covenant on Civil and Political Rights* (ICCPR) were incorporated into ACT law.

The primary aim of the HRA is to establish a 'dialogue model' for the protection of human rights in the ACT. The long-term aim is to build a 'human rights culture' of tolerance and respect for human rights reflecting the shared values of the members of the ACT community.

The dialogue model essentially seeks to ensure that human rights are taken into account when developing and interpreting ACT law, without displacing the current constitutional arrangements. The model has been described as an 'interpretive statutory model' based on similar models that have been established in the United Kingdom and New Zealand.

The 'dialogue' in this model is facilitated through the various mechanisms, including:

- (a) the *statement of compatibility* by the Attorney-General, in which Government bills are assessed for HRA consistency prior to introduction into the Legislative Assembly,
- (b) the *pre-enactment scrutiny role* of the Legislative Assembly, in which the Standing Committee on Legal Affairs reports on HRA issues raised by all bills prior to passage,
- (c) the *interpretive provision*, in which courts, tribunals and decision makers must adopt, where possible, a human rights consistent interpretation of ACT laws,
- (d) the *declaration of incompatibility*, in which the Supreme Court may declare a law to be incompatible with the HRA where such an interpretation cannot be adopted,
- (e) the *reasonable limits provision*, in which the legislature has the capacity to place justifiable and proportionate limits on HRA rights,

- (f) the *Human Rights Commissioner*, who reviews the impact of laws on human rights, monitors the operation of the HRA and provides human rights education, and
- (g) the *annual reports obligation*, in which government departments and agencies must report on their implementation of the HRA in their annual reports.

Anti-Terrorism Law

Overview

Since 2001, the Commonwealth Government has enacted a wide range of anti-terrorism laws. Its position at the apex of the Australian federation, and its international status, gives the Commonwealth Government primary responsibility for most anti-terrorism laws and policies. The Commonwealth has passed sweeping amendments to criminal, security intelligence and other legislation, relating to terrorist acts, terrorist organisations, terrorist financing, border security, aviation security, intelligence questioning and telecommunications interception.

States and Territories

While the Commonwealth Government may have primary responsibility for anti-terrorism law, it requires the agreement of the States and Territories to enact and implement those laws.

For example, while the Commonwealth has legislative power with respect to external affairs, it has limited legislative power with respect to crime and public order. Its power to enact criminal laws is 'ancillary to the performance of the responsibility of the Commonwealth to protect itself, its Constitution, its institutions and services and to enforce its own laws'.¹

COAG Agreement

Overview

On 26 July 2005, State Premiers wrote to the Prime Minister seeking a special meeting of COAG to address terrorism. The Premiers wanted to discuss, 'improvements to the existing national counter-terrorism arrangements and capabilities', 'community awareness [of terrorist threats and responses] in addition to their engagement in reporting suspicious behaviour' and 'a coordinated approach to preventing the spread of radical teachings advocating terrorism'.

On 4 August, the Prime Minister announced a special Premiers' Conference in late September 2005 to discuss proposed new laws. He indicated that they might cover 'counter terrorism legal frameworks; surface transport security; identity security; [and] advocacy of terrorism'.

COAG Communiqué

On 27 September 2005 the Council of Australian Governments (COAG) agreed that the Commonwealth and state and territory governments would enact legislation to strengthen existing counter-terrorism laws. At the meeting, COAG considered the evolving security environment in the context of the terrorist attacks in London in July 2005 and agreed that there was a clear case for Australia's counter-terrorism laws to be strengthened.

COAG agreed that the Commonwealth Criminal Code would be amended to provide for control

¹ Sir Garfield Barwick, Crimes Bill 1960, Second Reading Speech, House of Representatives, *Debates*, 8 September 1960, pp. 1020–1021.

orders and preventative detention for up to 48 hours to restrict the movement of those who posed a terrorist threat to the community. COAG also agreed that states and territories would enact legislation to give effect to measures which, because of constitutional constraints, the Commonwealth could not enact. These measures included preventative detention for up to 14 days and special stop, question and search powers to operate in places of mass gathering.

State and Territory Agreement

The involvement of the States and Territories in the process arose from constitutional issues.

The amendment of the Commonwealth Criminal Code required State and Territory agreement. The relevant provisions were referred by the States in 2002 under the Constitution. In principal, any amendment of those provisions required their agreement. This is reinforced by the *Inter-governmental Agreement on Counter-Terrorism Laws* made in 2004 (IGA). Under the IGA any amendments require majority support of the States *and* Territories. The IGA requires that States and Territories be consulted on the *text* of the proposed amendments.

As noted above, the other proposals required State and Territory legislation. The Commonwealth has limited power to enact 'non-punitive administrative detention' that was thought not to permit preventative detention for 14 days. It was also considered that stop, search and question powers, and random baggage searches, by Commonwealth officers would be valid in places where it had 'jurisdiction', but invalid in areas outside its jurisdiction.

Proportionality

COAG agreed that the resulting laws would be necessary, effective against terrorism, contain appropriate safeguards against abuse – such as parliamentary and judicial review – and be exercised in a way that is evidence-based, intelligence-led and proportionate.

Legislation

The ACT Government has been outspoken in its desire to apply human rights norms to anti-terrorism legislation introduced in Federal Parliament and in its own Legislative Assembly.

Commonwealth

The Chief Minister attended the COAG meeting with grave concerns about the need for the proposed laws. Before he agreed he sought assurances that the laws were necessary in the face of the risk confronting Australia. He received briefings from the Director-Generals of the Australian Security Intelligence Organisation and the Office of National Assessments.

He has since publicly stated that he agreed to the pursuit of these new laws, on the basis of pledges from the Prime Minister that they would be proportionate, adhere to Australia's international human-rights obligations, and involve real judicial oversight and review.

Territory

On 15 December 2005 the Chief Minister tabled an [Exposure Draft](#) of the Terrorism (Extraordinary Temporary Powers) Bill 2005 in the ACT Legislative Assembly.

The Terrorism (Extraordinary Temporary Powers) Bill 2005 (the bill) gives effect in the Australian Capital Territory to the COAG Agreement of 27 September 2005 that States and Territories introduce legislation on preventative detention for up to 14 days and give special stop, search and seizure powers to police officers to prevent and investigate terrorist acts.

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In line with the COAG agreement, the bill provides for preventative detention for up to 14 days to prevent an imminent terrorist act or to preserve evidence relating to the commission of such acts. The threat must be imminent. The danger to the community must be real. The detention must be reasonably necessary. And it must, in practice, be a measure of last resort.

The bill was developed in light of various legal opinions on human rights and constitutional issues in relation to the Commonwealth Act and the proposed ACT Bill. These include the opinion of the Solicitors-General, assisted by [Mr Stephen Gageler SC](#), the advice of the Human Rights and Discrimination Commissioner, [Dr Helen Watchirs](#), and [Professors Hilary Charlesworth and Andrew Byrnes](#). They also include opinions from [Mr Lex Lazry QC and Kate Eastman](#) specifically in relation to the ACT *Human Rights Act 2004*.

The bill also takes into account recommendations made by the (federal) Senate Legal and Constitutional Legislation Committee in relation to the laws proposed by the Commonwealth.

Additional safeguards, including some contained in the legislation of the other States that were considered the best in terms of human rights compatibility, constitutionality and adherence to established principles of justice, have also been incorporated to ensure that the ACT has the most effective, yet human rights compliant, legislation possible.

Specific Submissions

The following pages discuss the specific issues raised by the Eminent Jurists Panel.

Specific Issues

1. *What relevance has been given by government to human rights norms in regard to counter-terrorism laws and policies? Has your government questioned the relevance of these norms in the fight against terrorism?*

As indicated above, human rights norms have been given primary relevance in the ACT.

The ACT Government has been outspoken in highlighting the relevance of these norms.

For example, in evidence to a parliamentary committee examining the local legislation, the Chief Minister emphasised the significance of human rights concerns locally and federally:

I would like at the outset to provide some framework for the development of the bill which is under investigation today. As we are all aware, each of us is here today because Australia is having a debate that I believe essentially it shouldn't be having—a debate about which of our freedoms, rights and liberties we are prepared to surrender in return for greater physical security. The debate we ought to be having, of course, is how our rights can be secured, how our democracy can be protected from the threat of terrorism, not the extent to which we are prepared to do the terrorists' job for them and give those things up without a whimper.

I believe—and it is inherent in this legislation—that we can protect our rights and secure our democracy while still responding to the heightened threat posed by terrorists. I believe that this bill, which is before the standing committee, achieves these aims. I don't believe that the ACT's laws will leave the territory exposed. All that this exposure draft will do is ensure that we do not lightly surrender the very way of life that we seek to protect from terrorist attack.²

2. *What is the impact of counter-terrorism laws, policies and practices on the full observance of international humanitarian law; Is the application of those laws denied, are there any positions taken which affect the distinction between combatants and non-combatants?*

This is a matter for the Australian Government.

3. *Have anti-terrorist laws been passed by the use of exceptional procedures which reduce the Parliamentary role? eg, by executive regulation, by expedited procedures, or by reference to Security Council resolutions. Extent of public information about the level of threat. Effectiveness of regular reviews of the laws.*

The ACT Government has not sought to use exceptional procedures in the development, consideration or passage of the Terrorism (Extraordinary Temporary Powers) Bill 2005.

Information on the level of threat is held by federal agencies. The ACT is not in a position to distribute that information publicly, given its position vis-à-vis the Commonwealth.

However, there is substantial provision for review of local anti-terrorism laws in the ACT.

The Terrorism (Extraordinary Temporary Powers) Bill 2005 will be subject to the *Human*

² Jon Stanhope MLA, Chief Minister of the Australian Capital Territory, Standing Committee on Legal Affairs, Transcript of Hearing, 1 February 2006, pp 40–41.

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Rights Act 2004, including the requirement to interpret laws consistently with human rights, the capacity of the Human Rights Commissioner to review the impact of laws on human rights and the power of the Supreme Court to issue declarations of incompatibility.

The bill also includes its own review and oversight provisions. It has a 5-year sunset clause.

- 4. Impact of counter-terrorism laws on the role of the judiciary? Have the judiciary's powers to oversee the operation of the law, to ensure legality of actions been reduced? Has recourse to judicial remedies been diminished? What justification is given?*

The Terrorism (Extraordinary Temporary Powers) Bill 2005 gives a key role to the judiciary. For example, applications for preventative detention must be made to the Supreme Court.

Given the length of detention, its impact on the rights of detainees and the nature of the evidence used, the Supreme Court is the most appropriate forum. This will ensure judicial review and oversight throughout the entire process. It means that matters are decided at a hearing at which the subject is entitled to call witnesses, produce materials and make submissions. Every order is also subject to the ordinary avenues of appeal and redress.

In addition, every detainee may seek to have an order set aside or amended. The police must seek to have an order set aside if the grounds no longer exist.

It is a fundamental human rights requirement that preventative detention be subject to judicial control and oversight at every stage in the process. The safeguards and processes provided in the Bill are consistent with the proper exercise of judicial power by the Court and in keeping with the essential character of a court and its integrity.

- 5. Have there been changes in criteria for declaring state of emergency, and have any declarations or derogations from human rights occurred as a result?*

No.

- 6. How are 'terrorism', 'terrorist act', and 'terrorist organizations' defined in the law?*

The ACT legislation adopts the definitions of these terms used in Commonwealth law.

- 7. What new criminal offences, based on the definition of terrorism or related to terrorism, have been introduced, and how have the laws been used?*

The ACT has not introduced new criminal offences in relation to terrorism.

- 8. What changes have been made in arrest and detention provisions applicable to terrorism suspects? Have administrative detention, arbitrary arrest, restricted access to counsel, limit on right to be informed, etc been introduced?*

Aside from the provisions already discussed dealing with proposed preventative detention provisions, and other specific provisions dealing with special powers for entry, search and seizure in relation to a terrorist incident, there have been no changes to ACT law.

- 9. What significant counter-terrorism prosecutions have there been and what has been the experience in regard to prosecutions? Have there been other proceedings, such as detention, control orders in regard to terrorism suspects?*

The ACT has not had any prosecutions or other proceedings relating to terrorism.

10. Are there any special courts for this outside the justice system, or military courts or tribunals? [Not relevant for Australia.]

This is not relevant to the ACT.

11. Are there special jurisdiction inside the justice system, or special procedures, limiting the right to defence or other attributes of fair trial?

A detained person is entitled to contact family members, the ombudsman and a lawyer of their own choice or one appointed by the legal aid commission. A person with impaired decision-making ability may contact the public advocate.

Ordinarily, contact with the lawyer must be private, but it may be monitored if a senior police officer believes on reasonable grounds that contact would:

- interfere with or cause harm to evidence relating to a serious offence;
- interfere with or cause physical harm to a person;
- alert a person who is suspected of committing a serious offence;
- interfere with investigations in relation to a terrorist act;
- interfere with efforts to prevent a terrorist act; or
- interfere with the apprehension of a person for a terrorist act.

12. Have special evidence laws been introduced which may affect fair trial, and what justification is given for these?

There are no such provisions in ACT law.

13. Have laws or policies increased the risk of torture? eg, coercive interrogation?

In applications by police for preventative detention orders before the Supreme Court, the applicant is obliged to state that evidence has not been obtained directly or indirectly from torture.

There is a blanket prohibition on the use of such evidence in the court.

14. Have any laws or policies contributed to enforced disappearances or arbitrary killings?

This is not relevant to the ACT.

15. Are there any changes in laws or policies in regard to return and transfer of persons in terrorist cases which may affect human rights, or increased risk of torture? eg, return, extradition or deportation to risk of unfair trial, death penalty

Extradition and deportation are matters for the Australian Government.

16. Are there counter-terrorism laws which limit the right to freedom of expression? eg, censorship or incitement laws, laws about praise of terrorism, etc

The ACT does not have any counter-terrorism laws that limit freedom of expression.

17. Are there counter-terrorism laws which impose limits on freedom of association,

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assembly, religious expression? eg, proscription of organizations, etc. How are these justified?

The ACT does not have any counter-terrorism laws that limit freedom of association, assembly or religious expression. Proscription is a matter for the Australian Government.

18. Are there counter-terrorism laws affecting the right to privacy? Eg, surveillance laws, laws about collection and sharing of data. What is their justification?

The ACT does not have any counter-terrorism laws that limit the right to privacy in this way.

19. Do any counter-terrorism laws make distinctions on the ground of nationality, race, ethnicity, religion etc? Eg, racial or ethnic profiling, citizenship laws.

ACT Policing, in partnership with the Australian Intelligence Community and other Australian police services, select targets based on available intelligence and information. A blanket practice of 'profiling', based on grounds of race or ethnicity, would be inconsistent with anti-discrimination laws and incompatible with the ACT *Human Rights Act 2004*.

In addition, the Terrorism (Extraordinary Temporary Powers) Bill 2005 requires the Chief Police Officer to ensure that police officers exercising powers under the bill are trained about their obligations under the *Human Rights Act 2004*.

20. What procedures are used to control finances of terrorists, or to criminalize the financing of terrorism, eg freezing assets? What are the justification for these?

These are matters for the Australian Government.

21. Do counter-terrorism laws result in any reduction in accountability for human rights violations or lead to impunity, or reduction in access to remedies?

The ACT Government has strived to develop a law that complies with the requirements of the COAG Agreement without reducing the protection of international human rights norms or the availability of remedies under ACT law.