

## SUBMISSION

### ICJ EMINENT JURISTS PANEL

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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?

It is our contention that counter-terrorism laws *do* have the ultimate result of reducing accountability for human rights violations, and *do* have the consequence of diminishing access to (legal) remedies \_ even when they are enacted in advanced liberal democracies such as Australia. We wish to assert this in relation to two key areas that we consider to be still largely neglected in the context of Australian academic debate. They arise in the context of scientists themselves, particularly where their work may have implications for weapons science, and they arise also in the context of military personnel. Our concern in both of these cases is with the significant absence of both transparency and accountability – the levels of secrecy and confidentiality - that characterise their processes. That secrecy in itself compromises their processes and inevitably leads to impunity and reduction in access to remedies.

#### **Scientists and Weapons Science**

A key underlying imperative for the compliance Protocol to the *Convention on Biological Weapons* lies in the need to deter biological weapons proliferation. A further \_ and associated \_ imperative rests in the requirement to 'reduce the risks of the weaponisation of disease.'<sup>1</sup> The possibility of this essentially *weaponisation* of disease is by no means purely a hypothetical issue or

concern. As an editorial in *Nature* proclaimed back in 2003 \_ while the world may have celebrated the containment of the SARS outbreak, ‘...the epidemic has revealed gaps in our defences against emerging viral diseases and the ever-looming threat of a flu pandemic.’<sup>2</sup> There are, in this respect, increasing (and significant) fears regarding the uses of disease as weapons of bio-terrorism. Medical opinion, for example, asserts that:

‘Naturally occurring diseases such as SARS offer valuable lessons in preparation for a deliberate release of biological agents by terrorists.’<sup>3</sup>

The pressures that the creation of such bio-weapons place on governmental scientists includes pressure on their own part to contribute to the creation of an armoury suitable for “germ warfare” which are, indeed, manufactured under strict confidentiality and secrecy. Since September 11 and the New York anthrax “scare” in 2001, the concern that life sciences research could be misused through bioterrorist attacks has, in fact, increased.

In the USA and Australia, scientists are being called on to develop their national capacities to safeguard against such threats through applications of their scientific discoveries to law enforcement. Recent examples include the ‘world first’ development by an Australian scientific researcher of a technique that enables us to identify people from DNA that is contained in just one of their cells.<sup>4</sup> The techniques will be ‘useful in tracing important documents such as wills, government bonds and title deeds’<sup>5</sup> and they thus provide an enabling science to contribute to the prevention or to the avoidance of document fraud and money laundering.<sup>6</sup> This can be understood within the traditional parameters or boundaries of conventional law enforcement (but with the exception of using scientific techniques).

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<sup>1</sup> <http://www.acronym.org.uk/un/2001cbw.htm>

<sup>2</sup> ‘We have been warned’ *Nature* 10 July 2003, Vol 424, issue no 6945, p. 113

<sup>3</sup> Stephen G. Weber, Ed Bottei, Richard Cook, and Michael O’Connor, ‘SARS, emerging infections, and bioterrorism preparedness’ *The Lancet*, Infectious Diseases, Vol 4, August 2004: 483-484 [<http://infection.thelancet.com>]

<sup>4</sup> ‘DNA fingerprinting with a single cell’ *News in Science* 30/10/2002, <http://www.abc.net.au/science/news/stories/s713580.htm> (31/10/2002)

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

However, in the current international context of heightened security awareness the scientist is vulnerable to being called upon to invent and adapt science for national security purposes. He or she thus becomes distinctly vulnerable or susceptible to security scares and, more specifically , to the full force of espionage or treason law \_ particularly in the event of an alleged “misuse” of potentially or actually sensitive data.

In our view, weapons science is part of the web of lack of accountability in the counter-terrorist context. The United States has already presaged or pre-empted controls on dissemination of research, particularly those relating to cutting-edge microelectronics.<sup>7</sup> Recently, in ‘one of the most explosive espionage cases in US history’,<sup>8</sup> Los Alamos scientist Wen Ho Lee pleaded guilty to a lone felony count of mishandling nuclear secrets, raising memories of the trial of the Rosenbergs for treason during the Cold War. In this particular context, the prosecution of high-profile scientist Thomas Butler provides a backdrop to Ho Lee’s prosecution. That particular prosecution, for example, has been analysed as a ‘cause celebre for those who felt that the government was using him to scare scientists into obeying strict new bio-terror-prevention laws.’<sup>9</sup> The government was urged to drop that case precisely because there were predictions that it would, indeed, drive scientists out of biodefense research and (therefore) undermine \_ rather than promote \_ national security.<sup>10</sup>

A meeting, in this respect, in relation to the *Convention for Biological Weapons (CBD)* \_ in 2004 \_ was of the firm conclusion that strengthening surveillance for infectious disease supports the purposes of the BWC. Yet the lines between surveillance for disease (on the one hand) and surveillance on counter-terrorist bases (on the other hand) are, by no means, clearly demarcated in Australia. There is no doubt that the anthrax terrorist scare emerged from weaponised

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<sup>7</sup> Neal Lane, ‘The openness imperative’ *Foreign Policy*, Washington: Mar/Apr 2001, iss. 123, p. 80, 2 pgs, at

<http://proquest.umi.com/pqdweb?index=15&did=000000069244219&SrchMode=1&sid>  
(24/02/04)

<sup>8</sup> Alberta Lee, ‘Making a case for Los Alamos’s Wen Ho Lee’ *George*, Dec/Jan 2001, page 26

<sup>9</sup> ‘The Trials of Thomas Butler’ Vol 302 *Science* 19 December 2003, p. 2054-2063

<sup>10</sup> *Ibid.*

anthrax \_ and this was developed in the USA's own military research laboratories. Accordingly, in this security environment, the role of the scientist would seem to assume increasing significance. As the Royal Society Wellcome trust of the United Kingdom recently stated: 'The threat of advances in the life sciences being used for harmful purposes is a real one.'<sup>11</sup> In this respect, the Trust maintains that '...this [threat] needs imaginative thinking as the vast majority of work falls into the grey area of having some potential for misuse.'<sup>12</sup> The fate of government scientists, such as David Kelly in the United Kingdom, raise real concerns, then, as to the vulnerability of scientists in the pursuit of war \_ particularly where they are working in government science.

## **Military**

While there have been some particular attempts to suggest that Australia's counter-terrorist regime may be subject to constitutional scrutiny<sup>13</sup>, the absence of a Bill of Rights has facilitated the enactment of draconian laws that are not likely to be open to challenge on that basis. There are very few High Court cases that tell the Australian public what occurs in the closed environment of military justice. One particular case, however, that does provide some insight into the workings and operation of Australian military justice was the relatively recent High Court decision in *Re Colonel Aird; Ex parte Alpert*<sup>14</sup> which was decided in 2004.

In that decision the accused, who was a soldier in the Australian Regular Army and who was deployed to the Royal Malaysian Air Force Base at Butterworth in Malaysia, was charged with the rape of a woman in resort island of Pukhet in Thailand. The alleged rape occurred, in this respect, while the accused soldier was on (rest and recreation) leave from his military duties in Malaysia. The accused was, in fact, charged under Australian law in accordance with s 61 of the *Defence Force Discipline Act 1982 (Cth)* which incorporated the provisions

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<sup>11</sup> Report of a Royal Society – Wellcome Trust meeting held at the Royal Society on 7 October 2004

<sup>12</sup> RS Policy Doc 29/04: p. 2

<sup>13</sup> See Claire Mahon and Ken Palmer, "ASIO Bill: Constitutional Rights Under Threat", *Lawyers Weekly*, 2003, 149 (2), p. 9, and the extensive writings of Professor George Williams.

of the *Crimes Act 1900 (Cth)*. Section 54 of the *Crimes Act*, in this respect, made it an offence to engage in sexual intercourse with another person “without the consent of that other person.” It was argued by the accused that this Australian legislation was not applicable to him since he was not in uniform and not on duty and that (in consequence) he should only be subject to the ordinary national laws of Thailand. This argument, however, was rejected by the High Court who held that the impugned conduct, on the part of the accused, was of such a serious and reprehensible nature that “it had the capacity to affect discipline, morale and the capability of the ADF to carry out its assignments.”<sup>15</sup> As John Devereaux argues, this High Court decision would seem to be an (exceptional) example where, indeed, the Australian legal and military justice system has operated so as to achieve a degree of justice and accountability.<sup>16</sup>

This decision, however, would seem to be the exception, rather than the rule, in the context of Australia’s counter-terrorism laws which have the potential to significantly infringe individual liberties and to transgress the important ideals of accountability and transparency. Acts, such as the federal *Anti-Terrorism Act 2005 (Cth)* – which have as their aim “to better deter, prevent, detect and prosecute acts of terrorism”<sup>17</sup> – have the potential (we would suggest) to seriously infringe individual civil liberties unless they are also accompanied by proper or adequate safeguards. In this respect, we would argue that the Federal Government’s firm commitment to ensuring national public safety and to the protection of the public interest needs to be better balanced with a concern for upholding civil liberties and protecting and safeguarding individual rights. This is in our view another key or fundamental area of concern that needs to be addressed in the present counter-terrorist context.

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<sup>14</sup> (2004) 209 ALR 311.

<sup>15</sup> (2004) 209 ALR 311 at 314 per Gleeson CJ.

<sup>16</sup> See John Devereaux “Discipline Abroad: Re Colonel Aird; Ex parte Alpert” (2004) 23 *University of Queensland Law Journal*, 486.

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<sup>17</sup> See Susan Harris-Rimmer and Nigel Brew “Proposals to further strengthen Australia’s Counter-Terrorism Laws- 2005” Parliament of Australia Library, Online Issue, 6 October, 2005.