



Law Council
OF AUSTRALIA

Supplementary Information

Anti Terrorism (No. 2) Bill 2005

Senate Legal and Constitutional Committee

23 November 2005

1. The Law Council of Australia (“Law Council”) is grateful for the invitation to provide supplementary information and to respond to a question taken on notice at the Senate Legal and Committee (“the Committee”) in relation to its review of the Anti-Terrorism (No. 2) Bill 2005 (“the Bill”) on 14 November 2005.
2. The Chair of the Committee, sought the Law Council’s response to the Committee’s discussion with witnesses representing the Attorney General’s Department and AUSTRAC on 14 November 2005 in which they raised issues and concerns expressed in the submission made by the Law Council.
3. The Law Council responds to the question taken on notice and other matters raised by the Committee in relation to evidence given by the Law Council at the hearing including:
 - Adequacy of existing laws;
 - Comparison of Apprehended Violence Orders (“AVOs”) and control orders and preventative detention orders;
 - Rules of evidence;
 - Application of preventative detention orders on children;
 - Review and reporting; and
 - Sedition.
4. The Law Council commends the written submission lodged on 11 November 2005 in which issues were raised and recommendations were made. In this supplementary information, reference is made to the written submission where appropriate and does not cover the same ground.
5. The Law Council strenuously opposes the main measures in the Bill. In particular, the Law Council urges the Committee to recommend that the proposal to introduce preventative detention orders and control orders be abandoned. The Law Council also asks the Committee to recommend that the government abandon the sedition offences from the Bill.

ADEQUACY OF EXISTING LAWS

6. Clarification was sought in relation to the expertise of the Law Council to comment on the adequacy of existing laws.¹ The Law Council

¹ Senate Legal and Constitutional Legislation Committee, Proof Committee Hansard, page 82.

representing approximately 50,000 Australian lawyers has an expertise in law including, the operation of current law and the rule of law. The Law Council has a considerable role in commenting on matters relating to the administration of justice and regularly reviews existing and proposed laws and related measures. The Law Council submits that:

- Before the government strengthens existing laws by removing vital protections for human rights, it should review the adequacy of these law;
- The 17 arrests made in a joint task force of federal and state police and ASIO, which have resulted in charges being laid for terrorist related offences, demonstrate the effectiveness of existing law to anticipate alleged terrorist acts.
- The current ASIO powers to detain and question suspects up to 7 days have not been used to date.
- Dennis Richardson (Former Head of ASIO) commented in May 2005 to the Parliamentary Committee reviewing ASIOs questioning and detention powers that the laws which were enacted have worked well;
- The 7 July 2005 London bombings occurred despite the existence the preventative detention orders and control orders;
- Comments by Head of Police, for example, Commissioner Moroney (NSW Police) that the lessons learned from Bali, Madrid and London are that government effort should focus on ensuring that the law enforcement agencies and intelligence authorities are properly resourced and organised to deal with terrorist activity.

COMPARISON OF APPREHENDED VIOLENCE ORDERS AND CONTROL ORDERS AND PREVENTATIVE DETENTION ORDERS

7. It was suggested that there are currently “preventative type orders” such as AVO’s which are similar in operation to control orders and preventative detention orders.² The Law Council strongly disagrees with this assertion.
8. AVO’s are only able to impose prohibitions and restrictions and not detention. Another significant difference between the existing preventative type orders and control orders and preventative detention orders lies in the evidentiary requirement.
9. While AVOs are applied under State and territory law, there are some common features.³ In order to obtain an AVO, there is an identified person or persons who fear the commission of personal violence and

² Senate Legal and Constitutional Legislation Committee, Proof Committee Hansard, page 84.

³ In this discussion, NSW law is considered. In NSW, the legislation dealing with AVOs is contained in Part 15A of the NSW *Crimes Act* 1900 (sections 562A to 562V).

there is sufficient evidence to prove that the fear is warranted. Evidence is heard and it is proved (on a balance of probability) that the person in need of protection in fact fears violence or harassment or some other behaviour by the defendant that justifies an AVO being made.

10. The complainant needs to show to the court that they or an identified person or persons have reasonable grounds to fear:
 - the commission of personal violence; or
 - conduct amounting to harassment, molestation, intimidation or stalking (being conduct that in the opinion of the court is sufficient to warrant the making of an order)⁴
11. In relation to control orders and preventative detention orders, if similar types of evidence which are required for AVO's were present, criminal charges may be able to be laid. For instance, if there were identified persons who could testify that a suspect had seriously threatened to carry out a terrorist act and he or she had a history of similar behaviour or conduct, this could potentially warrant criminal charges to be laid. Contrary to this under the current Bill, the Law Council submits that the information required for a court to issue control orders and preventative detention orders could be based on suspicions and innuendo rather than evidence with probative value.

RULES OF EVIDENCE

12. Clarification was sought from witnesses in relation to the rules of evidence.⁵ The Law Council continues to be concerned in relation to the application of the rules of evidence particularly in relation to preventative detention orders which are issued by an issuing authority.
13. As discussed in the written submission, the Law Council believes that there is a significant risk that rules of evidence may not be applied to determine for instance, issues of admissibility, relevance and probative value as applies to making an order to issue warrants. The Law Council suggests that it is appropriate for the rules of evidence to be applied by an issuing authority in making an order given the serious impact of an order on a person's liberty.

PREVENTATIVE DETENTION ORDERS IMPOSED ON CHILDREN

14. The Law Council notes questions in relation to the application of preventative detention orders on children.⁶ In its submission the Law

⁴ S 562B of the *Crimes Act 1900* (NSW)

⁵ Senate Legal and Constitutional Legislation Committee, Proof Committee Hansard, page 16,19.

⁶ Senate Legal and Constitutional Legislation Committee, Proof Committee Hansard, page 5.

Council has discussed the implication of the Covenant on the Rights of the Child on these proposals. That said, the Law Council highlights the following recommendations:

- Where a child subject to a preventative detention order has informed one parent, ensure that both parents (or legal guardians) are able to communicate with each other without committing a disclosure offence.
- Ensure that a child served with a control order or a preventative detention order is provided an explanation of the relevant order in the presence of his or her parents (or legal guardians).
- Ensure that children are never held in custody with other children or adults who are charged with or convicted of criminal offences.

REPORTS AND REVIEW

15. The Law Council notes discussions with witnesses in relation to reporting and also the five year review.⁷
16. The Law Council strongly believes that the review mechanisms in place under the Bill are inadequate and ineffective.

Independent Oversight Required

17. Provision for independent oversight, such as by a Public Interest Monitor, which goes beyond the investigation of complaints by the Commonwealth Ombudsman, is required.
18. There is a vital role to be played by an independent body such as a Public Interest Monitor (PIM) in all aspects of the operation of any law that provides for control orders and preventative detention orders. Please refer to the written submission which discusses this issue in greater detail.

Regular Reports Required

19. More regular reports (ie. quarterly or half yearly) should be tabled in Parliament in relation to orders.
20. Reports should include information on the number of young persons aged 16-18 years and foreign nationals subject to orders made. The annual report should also indicate the number (and proportion) of persons subject to orders who were subsequently charged and convicted of terrorist related offences.

⁷ Senate Legal and Constitutional Legislation Committee, Proof Committee Hansard, page 11, 14.

Judicial Review

21. Notwithstanding that the Bill provides limited review to the AAT in relation to a preventative detention order, the LCA recommends full judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.

Five Year Independent Review Is Inadequate

22. Legislation should provide for regular independent reviews (at least every two years) conducted by a suitably qualified person such as a former judge. Five year review is far too long given that the sunset clause takes effect in 10 years.

SEDITION

23. Many senators queried the need to expand sedition laws.⁸ The Law Council urges the Committee to recommend the scope of the sedition provisions not be broadened as proposed by the government.
24. The Bill proposes to inappropriately and unnecessarily broaden sedition laws which interfere with freedom of speech and expression.

Constitutional Issue

25. The Law Council believes that the Bill does not protect statements or publications that may fall within the constitutional doctrine of implied freedom of political communication. This is discussed in the written submission.

Changes Are Disconnected From The Real Issue

26. The restrictions on communication under the proposed new offences are disconnected from the real issue of the threat of terrorist acts and are unwarranted, inappropriate and unnecessary.

Changes Interfere With Freedom of Speech And Expression

27. As discussed in the written submission, media organisations may be reluctant to broadcast or publish material out of caution that they may indirectly or recklessly “urge” the actions of others.
28. The concept of “urging” another person to do certain acts is undefined and may be interpreted to include broadcasters, publishers, journalists and media commentators. The Law Council believes that such changes imperil freedom of speech and expression.

⁸ Senate Legal and Constitutional Legislation Committee, Proof Committee Hansard, page 9.

29. The proposed measures have not been appropriately and reasonably adapted to address the terrorist threat and disproportionately infringe on freedom of speech.
30. This is also evident in the proposal to create the offences pursuant to s 80.2(8) in relation to “urging” another person to engage in conduct, which is intended:

“... to assist, by any means whatever, an organisation or country...that is either at war with the Commonwealth or engaged in “armed hostilities against the Australian Defence Force”.
31. Such offences could include peace activists and protestors, and may be unconstitutional.
32. The caution that is likely to be exercised by activists and media organisations is not in the interests of informed political debate. The Law Council believes that there should be an exemption to address such concerns instead of merely the operation of defences.

It Is Bad Policy To Knowingly Enact Flawed New Sedition Laws

33. The Law Council believes that it is not sensible policy to knowingly enact flawed laws with a view to reviewing them particularly as the proposed laws create serious criminal offences for which offenders face terms of imprisonment.
34. As stated in the written submission, the Law Council recommends that the existing sedition laws be reviewed to determine the need to have them in view of the number of new terrorist offences introduced. The new sedition laws should at the least be deferred pending that review.