

Australian Catholic Social Justice Council

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

The Australian Catholic Social Justice Council (ACSJC)¹ welcomes this opportunity to lodge a brief submission to the Senate Legal and Constitutional Legislation Committee on the *Anti-Terrorism Bill (No.2) 2005*.

The time afforded to make submissions to the present inquiry is extremely brief and that fact is reflected in the limited coverage of our submission.

This submission does not seek to address issues relating to the constitutionality of any aspects of the proposed legislation as these are outside the organisation's area of expertise and it is assumed that properly qualified bodies will address them.

The ACSJC wishes to raise briefly some concerns about the Bill both, first, in terms of the Church's principles concerning the protection of civil liberties and human rights in the face of terrorist threats and, secondly, in terms of particular provisions of the Bill.

As to the first aspect, the position of the Church, in summary, is that:

- Terrorism is to be absolutely condemned;
- States and individuals have a right to defend themselves against terrorism;
- The exercise of that right requires a balancing of the right against the rights of others; and
- The rights of others may be impinged only to the extent proportionally necessary.

As to the second aspect, the particular areas of the Bill which we will address are:

- the impairment of human rights;
- the appropriateness of control orders and preventative detention orders in the light of existing provisions;
- control orders;
- preventative detention orders;
- certain specific provisions of the Bill; and
- sedition offences.

Principles of Catholic social teaching

Catholic social teaching proceeds upon the premise that the basis, foundation and end of the State is the service of the human person.² The interest of the person is paramount, rather than the interests of the State. Governments must protect, foster and promote the human rights of all people and all groups. Such rights are civil and political as well as economic, cultural and social.

Governments must act not only in the interests of particular groups, but for the good of all. They must intervene in social and economic life to establish conditions that help each person and each group to achieve their potential as freely and fully as possible.

There is a significant congruence between Catholic social teaching and international human rights instruments such as the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*.

Responding to the particular threats of global terrorism in these times, the Church has clearly condemned this form of violence in the strongest of terms.

The Church recognises the right of individuals and states to defend themselves against terrorism. The defence must be carried out with respect for human rights and the rule of law.

The ACSJC respectfully suggests that the following Church teaching is of particular application to the *Anti-Terrorism Bill (No.2) 2005*:

Terrorism is to be condemned in the most absolute terms. It shows complete contempt for human life and can never be justified, since the human person is always an end and never a means. Acts of terrorism strike at the heart of human dignity and are an offence against all humanity; "there exists, therefore, a right to defend oneself from terrorism". However, this right cannot be exercised in the absence of moral and legal norms, because the struggle against terrorists must be carried out with respect for human rights and for the principles of a State ruled by law. The identification of the guilty party must be duly proven, because criminal responsibility is always personal, and therefore cannot be extended to the religions, nations or ethnic groups to which the terrorists belong. International cooperation in the fight against terrorist activity "cannot be limited solely to repressive and punitive operations. It is essential that the use of force, even when necessary, be accompanied by a courageous and lucid analysis of the reasons behind terrorist attacks". Also needed is a particular commitment on the "political and educational levels" in order to resolve, with courage and determination, the problems that in certain dramatic circumstances can foster terrorism: "the recruitment of terrorists in fact is easier in situations where rights are trampled and injustices are tolerated over a long period of time".³

This passage encapsulates the overarching concerns of the ACSJC that the new powers sought for Federal authorities in response to the perceived heightened risk of terrorism should not undermine our basic civil and political rights. As Bishop Christopher Saunders, Chairman of the ACSJC, stated recently:

No-one would deny the Government's responsibility to ensure that Australia's security arrangements are capable of detecting and addressing potential terrorist attacks. It is essential that such arrangements adequately respect and protect the rights of all Australians.⁴

The impairment of human rights

The ACSJC recognises that a terrorist attack on Australian shores or against Australian nationals overseas is a potential threat. The Federal Government has a responsibility to protect its citizens against terrorism and to take appropriate counter-terrorist measures. These measures must comply with the Government's obligations under international law.⁵

Some legal experts, civil rights organisations and other community organisations have raised concerns that the nation's response to the threat of terrorism should not infringe unduly upon established civil and political rights.

The current Bill would appear in many circumstances to contain the potential for undermining fundamental rights outlined in the International Covenant on Civil and Political Rights (ICCPR) – to which Australia is signatory. Such rights include, among others:

- the rights to liberty, security of person and freedom from arbitrary arrest or interference (Art. 9, 17 ICCPR);
- the rights to be charged, afforded the presumption of innocence, a fair trial and judicial review if an offence has been committed (Art. 9, 14 ICCPR);
- the right of minority groups not to be discriminated against (Art. 2(1), 26 ICCPR).

All these concerns are valid. Those raising them have also noted that the Government is not in the position of invoking Article 4 of the Covenant which would allow it, at a “time of public emergency which threatens the life of the nation and the existence of which is publicly proclaimed”, to take measures derogating from its obligations. It is noteworthy that, as far as the ACSJC is aware, the Federal Government’s National Counter-Terrorism Alert Level has remained steady at the ‘medium’ level of alert (the second lowest ranking) since the four-level system of alert was introduced in June 2003.

Under international law any justification for the derogation of obligations would need to be proportional to the threat and “not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”.

The Prime Minister has given welcome assurances on 9 September, 23 October and 8 November⁶ that there is nothing in the proposed legislation that could be regarded as targeting at any section of the community on a racial or religious grounds. The ACSJC does hold concerns that the practical application of these powers could have a disproportionate and unwarranted impact on Arab and Muslim Australians as a group.

On Friday 4 November, Attorney General Philip Ruddock responded to those criticising the Bill on the grounds that it would contravene Australia’s human rights obligations. Mr Ruddock said,

We have examined each and every one of these measures against our international obligations and they do not breach our international obligations.⁷

The ACSJC suggests that the Attorney General make public *by way of submitting to this Senate review* the information comprising the Government’s examination of each of the proposed measures of the Bill against Australia’s international obligations. It is suggested that the Government provides particular information on how the provisions of the Bill will not undermine our nation’s obligations under the ICCPR – both in terms of individual articles of the instrument and as a whole package. Particular reference to the imminence or size of a perceived threat to the nation in terms of Art.4 of the ICCPR that would justify the Federal Government taking any measures that might derogate from its obligations under the ICCPR would be valuable for the Parliamentary review of the proposed powers of the Bill.

The appropriateness of control orders and preventative detention orders in the light of existing provisions

It is important to note the extensive powers already given to Federal authorities by existing legislation to detect and counter possible terrorist threats. Among these are included powers:

- to charge substantive offences relating to terrorism, murder, property destruction and others;
- to charge conspiracy to commit or incitement to commit those substantive offences;
- to gather evidence by surveillance, phone taps, seizure and analysis of computers and the power to enter premises and seize documents;
- under Division 3 of Part 3 of the ASIO Act to obtain warrants to detain and question for up to 7 days or to question for up to 24 hours of “questioning time” which with overnight breaks can extend over many days;
- to require questioned person to produce any record or thing;

- to charge with an offence with a maximum penalty of 5 years imprisonment any person who fails to give any information to ASIO under the warrant, who knowingly makes a false or misleading response to a request for information from ASIO, who fails to produce any sought record or thing or who breaches secrecy obligations during a period of two years.

To date there has been little debate on how the current powers afforded to authorities in a broad range of legislation at the State and Federal levels are inadequate to deal with potential terrorist threats. An editorial in the "*The Age*" of 9 November 2005 made these observations following the recent arrest of people in Sydney and Melbourne:

Rather than proving a need for draconian new laws that are before the Federal Parliament, the evidence of this operation is that existing laws enabled pre-emptive action to thwart what authorities believed was a significant threat...

Mr. Howard's point that Australia "has never been immune from a possible terrorist attack" is beyond dispute. But it does not automatically follow that new powers are "certainly needed" or constitute a proportional response, not when proposed laws on sedition, preventative detention and control orders, backed by extraordinary secrecy provisions, would overturn principles that are part of the foundations of our democracy...

This operation by police and security agencies has publicly demonstrated that they have the legal tools they need to do their job. The Government, in stark contrast, has not spelt out clear deficiencies in current laws nor demonstrated a compelling practical need for a secret and draconian counter-terrorism regime.

The above passage from the *Compendium of the Social Doctrine of the Church* in dealing with the right to defend against terrorism noted that:

However, this right cannot be exercised in the absence of moral and legal norms, because the struggle against terrorists must be carried out with respect for human rights and for the principles of a State ruled by law. The identification of the guilty party must be duly proven, because criminal responsibility is always personal, and therefore cannot be extended to the religions, nations or ethnic groups to which the terrorists belong.⁸

It is in this setting that the appropriateness of the proposed new provisions relating to control orders (occupying 21 pages of the Bill) and preventative detention orders (occupying 45 pages of the Bill) arises for consideration. The length and complexity of those provisions indicate that the proposed new orders are no simple addition to the law enforcement armoury.

To a significant extent (as summarised below) those proposed new orders would increase the powers of the Executive to interfere with or abrogate the human rights of citizens in substitution for the powers of the Judiciary. Save to the extent that the Executive may plainly demonstrate why it should have the power to deprive a person of his or her liberty, that power should be exercisable only by the Judiciary with the concomitant rights to a fair trial, a presumption of innocence and, above all, the right to have proceedings conducted in public.

In relation to this issue **our submission** is that, in the light of its broad existing powers, the Executive have not demonstrated publicly that those new powers are necessary.

Control orders

It is convenient to deal first with an issue of general application. The importance of secrecy in relation to matters affecting national security and the importance of the doctrine of State Immunity is acknowledged.

In **our submission** there should be, in the case of legislation of the kind currently under review, an onus on those seeking to rely on those non-disclosure rights an obligation to persuade a Judicial body that they should be permitted to do so. Long established existing procedures enable the Executive to do so without disclosing the material in issue to a suspect or defendant.

The legislation provides for urgent interim control orders, interim control orders and confirmed control orders. The following specific matters warrant attention if, contrary to the thrust of our submissions, the legislation is to be enacted substantially in its current form.

Clause 104.12(1)(a)(ii) requires that there be served on the person who is the subject of an interim control order “a summary” of the grounds on which the order is made and Clause 104.12(2) excludes from that obligation the inclusion of national security material. Such last mentioned material will of course have been made available to the issuing Court.

If the procedure for an interim control order is to remain (see below) **our submission** is that all material (other than security material described in Clause 104.12(2)) should be made available to the subject in order to enable the subject to obtain proper legal advice and to seek in a timely fashion any judicial remedy or to properly resist the confirmation of the Order.

Pursuant to Clause 104.12(1) an interim control order must be served on the person affected at least 48 hours before the day appointed for the confirmation hearing. The result would be that the terms of the interim order would be in force for at least 58 hours (assuming a hearing fixed for 10.00a.m.). It is concerning that there is no limitation as to the maximum period for which it might operate prior to a confirmation hearing. A limiting mechanism should be provided.

There is no apparent reason why an application for an interim control order (other than an urgent interim control order) should not be made on notice rather than being made *ex parte*. The making of such an application on notice would enable the respondent to test and answer the allegations. Indeed, if an application is made on notice there may not need to be two judicial sittings, one to make an interim order and the other to confirm the order. Furthermore, the making of the order on notice would obviate the greater potential for unfairness in the operation of the interim order being for not less than 58 hours.

Our submission is that, except in the case of applications for an urgent interim control order, an application for a control order should be made on notice to the person sought to be effected.

Clause 104.4(2) requires a Court which is considering an application for an interim control order to have regard to the impact on the person of any potential obligation or restriction. It is **our submission** there should be included in the sub clause a specific obligation upon the Court to have regard to human rights law in that regard.

The provisions about control orders are contained in Division 104. Clause 104.1 provides that the object of the Division is to allow certain matters “*for the purpose of protecting the public from a terrorist act*”. Under clause 104.2(2) a senior AFP member may “*only*” seek consent from the Attorney General to request an interim control order “*if the member (a) considers on reasonable grounds that the order.....would substantially assist in preventing a terrorist act.*” A similar restriction is imposed on the Court to which an application is made in that it may make an order “*but only if ... (c) the court is satisfied(i) that the making of the order would substantially assist in preventing a terrorist attack.*”

It is difficult to see how the “*purpose*” of the Division could be achieved, how the senior AFP member could so “*consider*” or how the court could be so “*satisfied*” unless the material available to the authorities were not such as to justify, if not require, that the person be charged with one or other of the substantive offences on the statute books or with conspiracy or incitement of another to commit such an offence. If such a person were so charged, he and the community would have all of the protections which are available in the criminal justice system.

In the light of these considerations, **our submission** is that the Bill be amended to provide that such an application must not be made to the Attorney General if the material available to the authorities would justify the arrest of the person on a relevant charge.

Preventative detention orders

The regime for proposed preventative detention orders is contained in a proposed Division 105. The object of that Division is set out in clause 105.1 as being to allow a person to be taken into custody and detained for a “*short period of time*” in order to:

- (a) prevent an imminent terrorist attack occurring; or
- (b) preserve evidence of, or relating to, a recent terrorist act.

Although we see some problematic issues relating to sub-clause (b) we refrain from making submissions concerning it. The following observations and submissions relate only to the circumstance adverted to in sub-clause (a).

Our submissions may be more succinctly expressed by first outlining the proposed regime. It envisages two types of preventative detention orders – initial preventative detention orders and continued preventative orders. The former may be made by a “Senior AFP member” (as defined) and may be applied for by any AFP member. The latter may be made to an issuing authority as appointed under clause 105.2. Persons who may be so appointed are certain judges, retired judges and certain senior members of the Federal Administrative Appeal Tribunal.

Detention under an initial preventative detention order may extend for up to 24 hours and detention under a continued detention order may extend for up to an additional 48 hours.

By virtue of Clauses 105.4(2) and (4), an applicant for any detention order (whether initial or continuing) may make the application and the issuing authority may make the order “*only if*” respectively 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).....

It is suggested that there would be limited if any circumstances in which the applicant and the issuing authority could be so satisfied unless the circumstances were such as to justify the arrest and charging of the person with a substantive offence or with conspiracy to commit or inciting the commission of such a substantive offence.

In the light of these considerations **our submission** is that the Bill be amended to provide that such an application must not be made if the material available to the authorities would justify the arrest of the person on a relevant charge.

Clause 105.32(1)(b) requires that the person be given a summary of the grounds on which the order was made. For the same reasons as applicable to a control order, **our submission** is that a copy of all material (other than security material) should be given to the person.

Certain specific provisions of the Bill

1. Clause 4 of the Bill recites the fact that CoAG agreed on 27 September that it would after 5 years review the operation of the amendments made by some, but not all, of the Schedules to

the Bill and that **if** a copy of the report was given to the Attorney General it must be laid before Parliament.

Having regard to the nature of the legislation **our submission** is that the Bill should be amended to make such a review mandatory after two years, requiring a report as to the review to be provided to the Attorney General and an obligation to lay it before Parliament.

2. Clause 106.3 has a retrospective effect in relation to criminal liability and, in accordance with accepted principles, **our submission** is that it be withdrawn.
3. The Bill contains some express and some implied provisions conferring rights to judicial review. In **our submission** all such rights should be made explicit "*to avoid doubt*".
4. Since the Bill proposes a regime apart from the criminal justice system, the usual rule against ordering costs against the Crown should, in **our submission** be expressly made inapplicable to proceedings under the legislation.

Sedition offences

The ACSJC assumes that several other submissions will be made to your Committee on this aspect of the proposed legislation and that the points which we would wish to make will be made in one or more of them.

Our views are accurately reflected in a portion (at pp.12 – 14) of a letter dated 19 October 2005 from Dr Helen Watchirs, the Human Rights and Discrimination Commissioner of the ACT addressed to the Chief Minister and Attorney-General of the ACT and published on his website at http://www.chiefminister.act.gov.au/whats_new.asp?title=What's%20New

With the consent of Dr Watchirs the relevant passage appears in an appendix to this submission.

Concluding Statement

The Australian Catholic Social Justice Council is grateful for this opportunity to provide a brief submission and wishes the Committee well in its important task of reviewing the *Anti-Terrorism Bill (No.2) 2005*.

Contact details:

John Ferguson
National Executive Officer
Australian Catholic Social Justice Council
PO Box 1615
North Sydney, NSW, 2059
Ph: (02) 9956 5811

Notes

¹ The Australian Catholic Social Justice Council (ACSJC) was established by the Australian Catholic Bishops' Conference (ACBC) in 1987 as the national justice and peace agency of the Catholic Church in Australia. The Australian Catholic Bishops' Conference mandates the ACSJC to promote research, education, advocacy and action on social justice, peace and human rights, integrating them deeply into the life of the whole Catholic community in Australia, and providing a credible Catholic voice on these matters in Australian society. The ACSJC is accountable to the ACBC through the Bishops' Committee for Justice, Development, Ecology and Peace.

The ACSJC has lodged submissions with Parliamentary Committees on previous legislation dealing with the potential threat of terrorism. In November 2002, the ACSJC made a submission to the Senate Legal and Constitutional References Committee on the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*. A submission was lodged with this Committee in April 2002 concerning previously proposed amendments to ASIO Legislation. At that time, a submission was also made to the Parliamentary Joint Committee on ASIO, ASIS and DSD regarding the proposed amendments of the ASIO Bill and broader National Security Legislative Package.

² Human dignity is the starting point and central concern of Catholic thinking about human rights and justice in society. Each person is created in the image and likeness of God and so has an inalienable, transcendent God-given dignity. To speak of human rights is to speak of the claims that we can make on the basis of our human dignity. It follows that each member of the human family is equal in dignity and has equal rights. We are not isolated individuals but rather persons in community and so we must harmonise our claims to rights with those of others under the common good. The State has a particular role to play to foster the common good.

³ Pontifical Council for Justice and Peace, 2004, *Compendium of the Social Doctrine of the Church*, Libreria Editrice Vaticana, Art. 514

⁴ Bishop Christopher Saunders, Media Release, 28 October 2005

⁵ For example, as outlined in UN Security Council Resolution 1373 of 28 September 2001 and the UN Commission on Human Rights Resolution 2003/68 of 25 April 2003

⁶ Prime Minister, Transcripts of the Prime Minister's Doorstop Interviews, 9 September & 23 October 2005, Transcript of the Prime Minister's Interview with Kylie Gillies, Late News, Channel 7, 8 November 2005.

⁷ Attorney General quoted on ABC's 'PM', *Terror laws comply with international obligations: Ruddock*, 4 November 2005

⁸ Pontifical Council for Justice and Peace, op. cit.