



INTERNATIONAL COMMISSION OF JURISTS

AUSTRALIAN SECTION

GPO Box 173
SYDNEY NSW 2001
telephone +61 2 9286 8700
facsimile +61 2 9283 3323
email sec-gen@icj-aust.org.au
web www.icj-aust.org.au

7 October 2005

ICJ AUSTRALIA OPPOSES NEW COUNTER-TERRORISM LAWS

ICJ Australia has renewed its opposition to the introduction of draconian counter-terrorism laws that erode fundamental liberties and human rights developed over centuries of jurisprudence. ICJ Australia acknowledges the need for laws that tackle the increased threat of terrorism in Australia, but says that many of the Australian government's proposals given the go-ahead at the recent COAG meeting are a disproportionate response to the risk.

ICJ Australia says that with some exceptions, existing laws are sufficient to respond to that risk. It has been said that terrorists despise the pluralistic and libertarian societies in which we live. ICJ Australia takes the position that rather than being a measured response to the threat of terrorism, the proposed further laws hand victory to terrorists by undermining and irrevocably altering the very society they are designed to protect.

On 8 September 2005, the Prime Minister issued a media release outlining a number of new proposals intended to address the threat of terrorism. The proposals covered a range of matters, including the introduction of 14 days detention without charge, control orders, additional powers of search and seizure, and new terrorism offences being created. These proposals were approved by State and Territory premiers at a meeting of the Council of Australian Governments (COAG) on 27 September 2005, after they received a confidential briefing from the Australian Federal Police (AFP) and the Australian Security Intelligence Organisation (ASIO).

ICJ Australia says that the proposed laws are the kind that might be expected if the country was in a state of emergency. Many of the proposals represent a serious departure from the *International Covenant on Civil and Political Rights* (ICCPR) and the *Universal Declaration of Human Rights* (UDHR) to which Australia is a party. The ICCPR is appended to the *Human Rights and Equal Opportunity Commission Act 1986*, which has the responsibility to monitor Australia's compliance with the Covenant. Further, the Commonwealth of Australia and some States and Territories have incorporated the ICCPR into their Evidence Acts applicable in Australian courts. Whilst the UN may not have enforcement powers to force Australia to comply with treaties it has adopted, as a matter of fundamental principle and international law, Australia's laws should comply with international human rights standards we have signed on to.

ICJ GENEVA

President
The Hon Justice Arthur Chaskalson SC
Chief Justice
Constitutional Court of South Africa

Secretary-General
Nicholas Howen

Chair of Executive Council
The Hon John Dowd AO QC

ICJ AUSTRALIA

President
The Hon John Dowd AO QC

National Vice-President
The Hon Chief Justice David Malcolm AC
Supreme Court of Western Australia

Chairperson
Steve Mark
Legal Services Commissioner, NSW

Secretary-General
David Bitel
solicitor

Treasurer
Nicholas McNally
solicitor

Acting Assistant
Secretary-General
Lucy Robb

State Presidents
The Hon Justice Terry Connolly
Supreme Court of ACT

Judge John O'Meally AM RFD
President, Dust Diseases Tribunal of
NSW

Mr Colin McDonald QC
William Forster Chambers, NT

The Hon Justice Rosalyn Atkinson
Supreme Court of Queensland

The Hon Justice David Bleby
Supreme Court of SA

The Hon. Duncan Kerr SC, MP
Tasmania

Assoc Prof Spencer Zifcak
La Trobe University, Victoria

The Hon Justice Robert Nicholson AO
Federal Court of Australia, WA

Under the ICCPR, Australia is only entitled to derogate from civil and political rights after it has declared a state of emergency in accordance with Article 4. The government has not declared a state of emergency and appears to have no intention of doing so. ICJ Australia therefore calls on the Australian government to abandon these legislative proposals that breach fundamental rights, and demonstrate its commitment to the rule of law by conforming to the procedures established by Article 4, and with the Covenant generally.

Further, it is proposed that the laws would remain in place for ten years, at which time a sunset clause will activate. It is also proposed that a review of the laws will take place after five years. ICJ Australia considers that this period is excessive. It will entrench a climate of fear and division in the long term, whereby certain minorities feel alienated, and the next generation of Australians will grow up in a country that barely resembles the one we have always known. In a democracy, the people must have more control over the extent to which, and the length of time during which, their rights may be infringed.

Due to the draconian nature of these laws, if they are passed, ICJ Australia says that the period after which there would be judicial or parliamentary review should be shortened from five years to two, and the sunset clause should activate after three years instead of ten. This would bring the new laws into line with the existing ASIO legislation, which also contains a sunset clause that activates after three years. If after that period the government considers an extension of the laws necessary, it should be required to justify its view to the Parliament and to the people, having regard to the knowledge and experience gained over the three year period. International law does not permit violations of rights to persist longer than is strictly necessary in circumstances of emergency. ICJ Australia considers that our domestic laws should be held to the same standard.

Until the draft legislation is released, care should be taken when assessing the proposals. The legislation implementing these laws is yet to be drafted. Adopting the Prime Minister's categories of the proposed new laws, ICJ Australia sets out the following:

1. Control Orders

The proposal: A new regime to allow the AFP to seek, from a court, 12-month control orders on people who pose a terrorist risk to the community. Control orders may allow the police to fit targets with tracking devices, and control their associations with others.

The imposition of such conditions on individuals who are merely suspects (rather than proved to have committed terrorist offences) is a radical law and order measure that has the serious and real potential of ensnaring innocent people in the net. What is, in effect, punishment without conviction by any court, following an exercise in crystal ball gazing, is a serious departure from the rule of law and standards of justice we have come to value. Moreover, it has not been demonstrated that such orders would reduce the risk of terrorism. Consequently, ICJ Australia considers that the proposal should be abandoned.

2. 14 Days of Preventative Detention

The proposal: Cooperation between state and federal laws will permit detention for up to 14 days of people suspected to have information about terrorist threats.

ICJ Australia says that it is difficult to contemplate interrogation and other investigative techniques that would require a period of fourteen days to complete, unless they involve undue psychological intimidation and coercion arising from conditions of incarceration and intense interrogations of 14 days' duration. It creates an environment that introduces real risk of abuse. Imprisoning a person without charge for two weeks is not merely a practical measure designed to gather intelligence; it represents a step in a direction which abandons completely the

fundamental principles that a person is innocent until proven guilty, and ought not be deprived of their liberty without conviction by a court.

It should be highlighted that these laws would not only apply to people who are suspected of committing terrorist offences, but would also apply to individuals who may, even without knowing it, merely be thought to have information that ASIO and the AFP is interested in. The effect on families and livelihoods is potentially disastrous.

Existing laws have long been sufficient to investigate conspiracies of a criminal nature or the commission of criminal acts, and these draconian laws depriving the liberty of mere information holders is an extreme and disproportionate response that should not be contemplated by Australians.

3. Notice to Produce

The proposal: A new notice to produce regime will be introduced to facilitate lawful AFP requests for information.

ICJ Australia reserves its judgement until a draft of the Bill is released.

If the laws in this regard are limited to the collection of documentary and other physical evidence, ICJ Australia has no objection at this stage.

If, however, these notices to produce are designed to remove a suspect's right to silence, and right not to self-incriminate, then ICJ Australia says that it is an unwarranted abandonment of fundamental principles of law and justice.

4. Access to Passenger Information

The proposal: ASIO and the AFP will be provided with passenger information

At this stage, ICJ Australia has no difficulty with this proposal, provided appropriate safeguards relating to the use of the information are included.

5. Stop, Question and Search Powers

The proposal: The law will extend the stop, question and search powers of the AFP where there are reasonable grounds that a person might have just committed, might be committing, or might be about to commit a terrorism offence.

ICJ Australia reserves its judgement until a draft of the Bill is released.

If these powers only enable the gathering of physical evidence, ICJ Australia regards this proposal as a suitable and proportionate response to the risk.

If, however, these powers are designed to remove a suspect's right to silence, and right not to self-incriminate, then ICJ Australia objects.

6. Extending the Powers in the States and Territories and CCTV

The Prime Minister's announcement lacked specificity. ICJ Australia will determine its response to this proposal once the legislation is drafted.

7. ASIO Warrant Regime

The Proposal: ASIO's special powers warrant regime is being refined to:

- *clarify the definition of 'electronic equipment', and allow for entry onto premises, in the computer access warrant provisions*
- *extend the validity of search warrants from 28 days to 3 months*
- *extend the validity of mail and delivery service warrants from 90 days to 6 months*
- *amend the search warrant provisions to provide that material may be removed and retained for such time as is reasonable "for the purposes of security".*

ICJ Australia reserves its judgement until a draft of the Bill is released, to determine if appropriate safeguards are included.

8. New Offences

Proposal 1: It is proposed to create an offence of leaving baggage unattended in an airport.

ICJ Australia holds the view that in order to manage unattended luggage in an airport, it is not necessary to criminalise an omission that many innocent people may find themselves convicted of. There are other practical strategies that could be employed to prevent people leaving their baggage unattended that do not require ordinary travellers being arrested and convicted for serious terrorism-like offences. It is an over-reaction to a situation that could be otherwise managed.

In the alternative, if such an offence is to be introduced, proof of intention should be a required element. Mere omission should not result in criminal liability for a terrorism offence. Such a conviction can have serious permanent impacts on a person's life.

Proposal 2: An offence of incitement of violence against the community will be introduced, to replace the existing offence of sedition.

It is not possible to properly analyse this proposal without seeing the specific legislation and the definitions involved. ICJ Australia acknowledges that there may be a need to address direct inciting of violence that leads to specific terrorist threats, however, great care must be taken not to extend that nexus too far such that it smothers freedom of speech.

If incitement occurs to the extent that a person aids and abets or otherwise through speech brings about a specific terrorist attack, then an offence may be appropriate. However, ICJ Australia considers that an offence that prevents a person expressing an ideological viewpoint in general terms that is not linked to a specific terrorist offence, by criminalising those words, and punishing people for what they think rather than what they do, is a serious and very dangerous departure from the status quo. The legislation must be closely scrutinised when it is released.

9. Further Offences misleading ASIO, and threatening aviation security

This proposal has only been described in very general terms. ICJ Australia cannot analyse these general proposals without seeing the specific legislation. In some cases, offences may be reasonable, and ICJ Australia reserves judgment until the Bills have been released.

10. Terrorism Offences in the Criminal Code

The proposal: Terrorism offences in the Criminal Code will be clarified as will the criteria for listing terrorist organisations extended to cover organisations that advocate terrorism.

The Prime Minister's announcement is very general in nature and ICJ Australia reserves judgment until the legislation has been released.

11. Citizenship

The proposal: The legislation will:

- *Extend the waiting period required to obtain citizenship by 12 months to three years,*
- *Introduce security checking of citizenship applications, so that citizenship applications can be refused on security grounds; and*
- *Strengthen the deprivation of citizenship provisions relating to serious criminal offences to include offences committed in the period between approval of an application and acquisition of citizenship.*

ICJ Australia notes that citizenship can be refused or cancelled on character grounds under existing laws where a person has committed serious criminal offences or where a person poses a threat to national security. As a general proposition, ICJ Australia regards current laws as adequate in dealing with this area, and will comment further once the legislation has been released.

12. Terrorist Financing

The proposal: The legislation will change the terrorism financing regime to further implement the crime of financing terrorism, alternative remittance dealers, wire transfers and cash couriers.

ICJ Australia agrees that intentional funding a terrorist attack ought to be a serious criminal offence. ICJ Australia holds the view that great care must be given not to ensnare innocent people making charitable donations in good faith without knowledge of a charity's link to terrorism. Attending what might be regarded as a community function and dropping some coins into a jar should not be a criminal offence unless the person does it with actual knowledge that the donation has been made to finance terrorism. When the legislation has been released, ICJ Australia will be more specific in its response.

For further information, please contact **The Hon John Dowd AO QC**, President, ICJ Australia; or Mr Steve Mark, Chairperson, ICJ Australia; or Mr Nicholas McNally, Honorary Treasurer, ICJ Australia.

www.ICJ-Aust.org.au