PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY
Review of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979

Australian Human Rights Commission

Mr Josh Wilson asked the following question on 23 May 2024:

Mr JOSH WILSON: More broadly, to pick up some of the points that the deputy chair was making, I think one of the difficult things in this area is that they're extraordinary powers and they're used very sparingly, which is a good thing. Part of the argument that the security and law enforcement agencies make is, essentially—to use the deputy chair's analogy—this is a very specific and rarely used tool. You want to have it there when you need it. The evidence of its use to date seems to back up what the law enforcement and intelligence agencies would say, which is that when it's used it's used appropriately.

The other perspective I think we do have to take is the potential for there to be this sort of creeping infringement on what are significant longstanding institutional pillars of human rights and good legal process. It's not like we haven't seen examples in other parts of the world where these kinds of provisions do get improperly used. I'm not saying it's intentional, but that's just the way that it turns out. I invite you to give us an example, because it's hard to understand in the abstract, if you're aware of it internationally or even as a theoretical outcome of the kinds of things that can go wrong where you have extraordinary powers that persist when they're no longer needed or exist in ways that are not subject to proper protections and safeguards.

Ms Finlay: Could I make two points in relation to that? The first is that, at a general conceptual level, the Australian Human Rights Commission would accept that there is always a risk when extraordinary powers, even when they're used in a limited and restricted way, become normalised. In this space there is always a need to have that balance and that tension of ensuring we have sufficient protections for national security while also recognising the need to respect individual rights and freedoms. That requires constant revision, in light of both how those powers are used and how the threat environment is changing, and it's something that we would say does need to be constantly revised and considered to ensure that the powers you have continue to be necessary and proportionate in changing circumstances. In terms of a specific example, I must admit that I'm loath to give a specific example off the top of my head, given the fact that these things don't ever operate in isolation. Finding an example that does appropriately demonstrate the types of things you're talking about is something that we would appreciate being able to do on notice, if possible, to ensure that it does properly address your question and that we're not ignoring the entire overarching framework or drawing an example where the analogy doesn't quite apply.

Mr JOSH WILSON: I'd appreciate that, and I think the committee would welcome it.

The response to the Member's question is as follows:

There is a risk that extraordinary powers enacted for a specific purpose to address a particular concern are misused or become normalised and creep into other areas in a way that was not intended at the time that they were introduced.

This concern is heightened in the context of counter-terrorism laws which involve less transparency, but also exists in relation to other analogous laws such as the expanding use of post-sentence detention or supervision powers for offenders other than those convicted of terrorism-related offences. An example of the normalisation and progressive expansion of these types of powers is illustrated by Western Australia's *Dangerous Sexual Offenders Act 2006* (WA), which initially empowered the Supreme Court of Western Australia, on application by the Director of Public Prosecutions or the Attorney General, to order post-sentence detention or supervision of sex offenders who pose a serious danger to the community. This power to order the continued detention or supervision of a person after the completion of their sentence was intended to protect the community from the risk of the offender committing a serious sexual offence. Continuing detention orders under this power were indefinite but subject to annual review, while supervision orders were finite but not subject to any statutory limitation.

In 2020, the *High Risk Serious Offenders Act 2020* (WA) replaced the *Dangerous Sexual Offenders Act* and expanded these powers to allow for post-sentence detention or supervision to be ordered in relation to individuals who have been convicted of a broad range of offences, including robbery, assault with intention to rob, stalking, lighting or attempting to light fire likely to injure and dangerous driving causing death or grievous bodily harm.

The High Court considered this legislation in *Garlett v Western Australia & Anor* [2022] HCA 30 and found that it was constitutionally valid. However, there were two strong dissents from Gageler J (as his Honour then was) and Gordon J. Those dissents are valuable when considering the wisdom of the continual expansion of extraordinary powers. Justice Gageler said at [145]-[152] that conferring on the court the extraordinary function of preventative detention would only have a legitimate nonpunitive objective if the harm sought to be protected could be characterised as 'grave and specific'. His Honour warned at [148] of 'the extraordinary becoming the ordinary – the exception becoming the rule'. His Honour did not accept that the offences of robbery and assault with intent to rob, which were relevant to the facts of the case, were capable of giving rise to harm of sufficient gravity to justify conferring the power of preventative detention on a court (at [153]-[159]). Gordon J said at [188] that post-sentence preventative detention regimes should be seen as exceptional and as depending on the nature and character of the past offending and possible future offending sought to be prevented. Her Honour said that the Act 'goes beyond the exceptional' (at [191]). The harm sought to be protected against was not 'grave and specific' (at [190]) and was 'not so exceptional as to warrant such a scheme' (at [191]).

An example of where extraordinary national security powers have been misused is Case Study 1 in the Commission's submission to this committee in its review of Australian Federal Police Powers dated 10 September 2020.[1] This case study relates to the misuse of warrantless arrest powers by police during Operation Rising in 2015:

> Mr Eathan Cruse, a young Aboriginal man, was 19 years old on 18 April 2015 when the house in which he was staying with his parents and siblings was raided by Victorian police from specialist counter-terrorism units at around 3.30am.

[1] Submission of the Australian Human Rights Commission to the Parliamentary Joint Committee on Intelligence and Security on its Review of Australian Federal Police Powers dated 10 September 2020, pp 28-29, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ReviewofAFPPowers/Submissions (footnotes omitted).

The raid was one of six raids conducted in different locations across Melbourne in the early hours of that morning as part of Operation Rising. One of the people arrested as a result of those raids, Mr Sevdet Besim, was later convicted of doing an act in preparation for, or planning, a terrorist act and sentenced to 14 years imprisonment.

Mr Cruse had been a friend of Mr Ahmad Numan Haider. Mr Haider had been shot and killed by a police officer in September 2014, after Mr Haider had stabbed him and another police officer with a knife. Mr Cruse became a person of interest to the police because he was a friend of Mr Haider and is a Muslim.

The arrest of Mr Cruse was recently considered in detail in a civil action brought by him against the State of Victoria. The following factual findings were made by the Court in that case:

> When he was told by a police officer to ‘Get down’, Mr Cruse immediately lay face down on the hallway floor, with his hands flat down on the floor. …
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> [A]fter his hands had been cuffed behind his back, a police officer struck him to the left side of his head, causing him to bleed. … [A] police officer slammed Mr Cruse into the fridge, and then pushed him to the floor. …
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> One or more police officers, armed and armoured, their faces masked, struck Mr Cruse repeatedly to his head, neck and upper body while he was lying, handcuffed and defenceless, on his parents’ kitchen floor. As he lay there, bleeding from the head, one of them threatened him with more of the same. …
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> Two police officers then escorted Mr Cruse out of the house. As they walked out the front door, one of the officers twisted Mr Cruse’s wrist and said: ‘Don’t fucking say a word’.

The judge did not make these findings lightly, saying that she was ‘acutely conscious that it is a serious matter to find that police officers beat a man who was restrained and defenceless’. Her Honour described the assault on Mr Cruse as ‘cowardly and brutal’ and ‘a shocking departure from the standards set for police officers by Parliament and expected of them by the community’.

The raid on Mr Cruse’s parents’ house was undertaken pursuant to a search warrant under s 3E of the *Crimes Act*. Mr Cruse was purportedly arrested pursuant to s 3WA of the *Crimes Act*, which is a power to arrest a person, without first obtaining a warrant, for a terrorism offence. The alleged offence was that he was ‘doing acts in preparation for a terrorist act’, contrary to s 101.6(1) of the *Criminal Code*. The Court found that the arrest was unlawful because neither of the arresting officers suspected on reasonable grounds that he had committed the terrorism offence for which he was arrested. Further, there were no reasonable grounds for anyone to suspect him of that offence.

After Mr Cruse was interviewed by investigators, he was released without charge. As at the date of his civil hearing in July 2019, he had never been charged with any terrorism offence.

> The judge made a number of comments about the danger of police misusing the extraordinary powers given to them to combat terrorism:
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>> Section 3WA was added to the *Crimes Act* (Cth) as part of a suite of counter-terrorism measures … . It lowered the threshold for arrest without warrant for terrorism offences to enable police to take more rapid action and to disrupt terrorist activity at an earlier stage. Other measures introduced by that legislation included control orders, preventative detention orders, and stop, search and seizure powers. These measures conferred on police, and other law enforcement agencies, extensive powers to interfere with the liberty, privacy and personal integrity of suspected terrorists. … It is imperative that police exercise these powers with care and discretion, and only when the conditions for their exercise exist. The necessary care and discretion was not exercised in this case. The decision of the Joint Management Committee to arrest Mr Cruse, rather than simply executing a search warrant at his house, was unexplained. The evidence did not demonstrate a reasonable basis to suspect that he was planning a terrorist act.
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> This misuse by police of the power of arrest without warrant was a significant factor in the Court awarding exemplary damages to Mr Cruse.

A further example of inappropriate conduct by authorities in relation to the exercise of extraordinary counter-terrorism powers is the non-disclosure of the Corner Report in proceedings seeking continuing detention orders under Div 105A of the *Criminal Code*. The Corner Report was a research report commissioned by the Department of Home Affairs, which cast serious doubts on the reliability, validity and equity of the violent extremism risk assessment tool used by the Department of Home Affairs, the Violent Extremism Risk Assessment Version 2 Revised (VERA-2R). The VERA-2R tool was relied on in the application for a continuing detention order against Mr Benbrika in November 2020.

The Independent National Security Legislation Monitor (INSLM) and the Supreme Court of Victoria in *Benbrika v Attorney-General of the Commonwealth* [2024] VSC 265 found that the Corner Report should have been provided to Mr Benbrika and produced to the Court in relation to the continuing detention order being sought against him.

In her Honour's judgment, Hollingworth J said at [25]:

> The Corner report was clearly a document which should have been disclosed in the CDO and first review proceedings. The Minister for Home Affairs did not disclose the contents or existence of the Corner report to Mr Benbrika or the court, even though the underlying validity of VERA-2R was an absolutely fundamental issue in dispute in the earlier proceedings. The A-G now concedes that the non-disclosure of the Corner report was a serious breach of the disclosure obligation imposed by the [Criminal Code Act 1995 (Cth)].

At [315]-[317], her Honour said:

> The statutory requirement that the AFP Minister disclose exculpatory material is a fundamental safeguard to ensure the protection of individual liberty under what is very unusual and draconian legislation.
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> What happened in this case should never have happened, and should not be repeated in the case of Mr Benbrika or any other person the subject of a post-sentence order application.
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> The non-disclosure of the various expert reports amounts to a serious interference with the administration of justice.

It is critical for Australians to be able to trust that authorities will only use their extraordinary powers lawfully and as they were intended. This need is particularly heightened in the case of security agencies which, by their nature, undertake activities in a way that is less transparent to the public. To prevent misuse, it is important for there to be effective safeguards on extraordinary powers, and that powers that are no longer required are removed from legislation.