6

Continuation of the legislation

Proportionality

6.1 Legally, the use of extraordinary powers, which restrict the rights and liberties of citizens[1], is acceptable only in times of proclaimed public emergencies.[2] In a liberal, democratic society, under these circumstances, the restriction of rights must be proportionate to the nature, level and duration of the threat and not a precedent for permanent, restrictive, legal arrangements. The Centre of Public Law argued that:

> It is vital to view these powers as temporary, exceptional measures …;
>
> to regard 'national security' as being a vital interest because of its capacity to protect and maintain rights and liberties …; and
>
> the debate should be one about limiting rights and liberties only for the purpose of safeguarding rights and liberties from terrorist threats.[3]

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1 Over and above ordinary limits.

2 However, this does not extend to the non-derogable rights, such as the right to life and freedom from torture and slavery. States of emergency, which require the derogation of rights, should also be proclaimed domestically and notified to the other states parties to the ICCPR through the Secretary-General of the UN. HREOC submission no. 85, p.28.

3 Centre of Public Law submission no. 55, p. 2.

6.2 A public emergency was defined for the Committee as one that is actual or imminent and one that threatens the 'life of the nation'.[4]

6.3 The need to test proportionality, in particular the need to justify extraordinary powers against the existence of an emergency, pervades not only international law but a long line of cases in the domestic law of comparable jurisdictions.[5] Most recently, in December 2004, in the case of *A v Home Secretary*, Lord Hoffman argued that the then circumstances in Britain did not compare with emergencies previously weathered.

> Of course the government has a duty to protect the lives and property of its citizens. But that is a duty it owes all the time and which it must discharge without destroying our constitutional freedoms. There may be nations too fragile or fissiparous to withstand a serious act of violence. But that is not the case in the United Kingdom.
>
> This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. … Whether we would survive Hitler hung in the balance, but there is no doubt we will survive Al Qaeda. … Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.[6]

6.4 The London Metropolitan Police Commissioner, Sir Ian Blair, after the bomb attacks on 7 July 2005, echoed similar 'proportionate' sentiments:

> If London can survive the Blitz, it can survive four miserable events like this.[7]

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4 Centre of Public Law submission no. 55, p. 4.

5 Mr Jon Stanhope, Chief Minister, ACT Government submission no. 93, p.1-2; See for example, UN Human Rights Committee General Comment No.29 (24 July 2001*); Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539; *Aksoy v Turkey* (1996) 23 EHRR 553; *Marshall v United Kingdom* (10 July 2001, Appn No 41571/98); *Ireland v United Kingdom* (1978) 2 EHRR 25; *Lawless v Ireland* (No.3) (1961) 1 EHRR 15. The need to test proportionality was emphasised by the United States Supreme Court during the Second World War in *Korematsu v United States 323 U.S. 214* (1944); during the Korean Conflict by the High Court of Australia in the *Communist Party Case* (1951) 83 CLR 1.

6 Paragraphs 95-96, decision in A v Home Secretary quoted from Centre of Public Law submission no. 55, p. 4.; *A (FC) and Ors v Home Secretary* [2004] UKHL 56.

7 *The Bulletin*, 19 July 2005, p. 20. The article also noted that during the blitz, 20,000 civilians died between 1940 and 1941, 1,500 on one night.

6.5 Many submissions questioned whether the extraordinary powers given to ASIO under Division 3 Part III are proportionate to the level of terrorist threat which Australia is currently facing or likely to face.

6.6 Proportionality is a legal principle which requires that:

- The legislative objective must be sufficiently important to justify limiting fundamental rights;
- The measures adopted must be rationally connected to that objective; and
- The means used must be no more than that which is necessary.

6.7 The Centre for Public Law argued that, in times of emergency, measures that are necessary may be over and above that ordinarily permitted if measures that are least restrictive have failed. Measures must last only as long as the emergency.[8]

Australia's security environment

6.8 When the legislation was first introduced, the Attorney-General acknowledged that:

> These measures are extraordinary, but so too is the evil at which they are directed.[9]

6.9 The security context was the aftermath of the terrorist attacks on the World Trade Centre on 11 September 2001, and the Attorney-General went on to stress the importance that:

> Australia does not forget the catastrophic results that terrorism can produce.[10]

6.10 The nature of terrorism was perceived to pose a threat entirely different from any danger previously faced by Australia. It was described by the Attorney-General as quite unlike ordinary crime, necessitating a response quite unlike the accepted responses to criminal activity. The way terrorist networks are organised, and the horrific destruction which terrorist acts can inflict on ordinary citizens going about their daily lives, called for extraordinary measures to protect the lives and the rights of Australians and Australian interests.

8 Centre of Public Law submission no. 55, p.3.

9 The Hon Daryl Williams, MP, Attorney-General, *ASIO* Legislation Amendment (Terrorism) Bill 2002, Second reading House of Representatives, *Hansard,* 21 March 2002, p. 1932.

10 ibid

6.11 In the Second Reading debate in September 2002, the level of threat in 2002 was described by the Attorney-General:

> While there is no specific threat to Australia, our profile as a terrorist target has risen and we remain on heightened security alert. Our interests abroad also face a higher level of terrorist threat, as evidenced by the plan to attack the Australian High Commission in Singapore and the fact that recently we have seen the Australian Embassy in East Timor closed temporarily as a result of a terrorist threat.[11]

6.12 Fears of terrorist attack were heightened by the Bali bombing, when 80 Australians were killed in October 2002. The extraordinary measures encompassed by the Bill were now characterized, in the debate in June 2003, as an attempt to protect the Australian people 'against a known threat'.

> The consequences of that threat have already been demonstrated starkly in events on September 11 and, particularly as far as Australians are concerned, on 12 October last year in Bali – and less starkly in myriad different ways in many countries around the globe who have experienced terrorist incidents over the course of the last few years. We have a definite identified threat to this country"[12]

6.13 And, in his concluding remarks, the Attorney-General said:

> We have always said that we recognise that this bill is extraordinary; indeed, I have indicated repeatedly that I hope the powers under the bill never have to be exercised. But this bill is about intelligence gathering in extraordinary circumstances…"[13]

6.14 An important safeguard introduced into the present legislation is the sunset clause, included as an amendment to the original Bill. Whether the extraordinary measures introduced in 2002 are justified in the present security environment is fundamental to this Committee's review of the implications of the legislation. The nature of the threat facing Australia and Australians, its severity and likely

11 The Hon Daryl Williams, MP, Attorney-General, *ASIO* Legislation Amendment (Terrorism) Bill 202, Second reading House of Representatives, *Hansard,* 23 September 2002, p.7040

12 Hon. K Beazley, MP, *ASIO* Legislation Amendment (Terrorism) Bill 2002, Second Reading, House of Representatives, *Hansard,* 26 June 2003, p.17678

13 Hon. Daryl Williams, MP, Attorney-General, *ASIO* Legislation Amendment (Terrorism) Bill 2002, Second Reading, House of Representatives, *Hansard,* 26 June 2003, p.17671

duration provide the context for the Committee's assessment of the need to restore powers previously used in Australia only during the World Wars.

6.15 In his appearance before the Committee, the then Director-General of Security, Mr Dennis Richardson, said that:

> If we have learnt anything from the past few years, it is that we need strong and balanced counterterrorism laws in place to be able to respond effectively to the threat of terrorism.[14]

6.16 On the nature of the current threat, Mr Richardson argued that:

> [I]n each of the five years between 2000 and 2004 inclusive, there was either a disrupted, an aborted or an actual attack involving Australia or Australian interests abroad. In 2000, we had the planning by Jack Roche … to attack the Israeli Embassy in Canberra and consulate in Sydney. In 2001, we had disruption to the planning by Jemaah Islamiah in Singapore to attack Western interests in Singapore – mainly US, but including the Australian High Commission. In 2002, we had Bali. In 2003, we had the disruption to the planning by Willie Brigitte and others in Australia to carry out a terrorist attack here. On 9 September 2004, we had the attack against the Australian Embassy in Jakarta.[15]

6.17 The Director-General described the threat as a long term generational threat and asserted that further attacks were inevitable.[16]

6.18 The Committee notes that, despite the above examples, no significant terrorist violence has occurred inside Australia, at least since the mid nineteen eighties.[17] Anti-terrorist legislation such as Division 3 Part III is primarily directed at the domestic threat. Apart from the secrecy

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14 ASIO transcript, public hearing 19 May 2005, p. 2.

15 ASIO transcript, public hearing 19 May 2005, p. 2.

16 ASIO transcript, public hearing 19 May 2005, p. 2.

17 There were a series of actual bombings in Australia which might be described as politically motivated violence: the Hilton bombing in 1978, the assassination of the Turkish Consul-General in 1980, the bombing of the Israeli Consulate General and the Hakoah Club in 1982. Jenny Hocking, in *Terror Laws,* makes the point that 'a peak of 83 such incidents of politically motivated violence and vandalism was reached in 1971', see p. 111. In 1886 the Protective Services Coordination Centre released information on 'identifiable terrorist incidents in Australia between 1970 and 1985', including 16 incidents of violence which can be attributable to Yugoslav separatists (one death resulting), five incidents attributed to the Ananda Marga (three deaths) and two deaths from an attack by the Justice Commandos of the Armenian Genocide. See Hocking, op. cit. p. 121.

provisions, the power cannot be exercised outside the territory of Australia. However, the Committee recognises that Australia has intelligence sharing obligations which, in a world where terrorist groups operate across borders for both the planning and execution of terrorist acts, intelligence gathered in one jurisdiction could save lives, Australian and others, in another jurisdiction. This is a serious and important obligation.

6.19 Nevertheless, in passing legislation that restricts the rights of Australians in this country, the level and immediacy of threat as it pertains to this country must have some significance and be given some weight in considering the necessity for extraordinary powers.

6.20 Most submissions queried whether the present legislation is in fact balanced or necessitated by the current threat level in Australia. None questioned the need to protect Australians from terrorist attacks. The ICJ noted in its submission that the 'conviction of Jack Roche … for conspiring to bomb the Israeli Embassy here in Canberra suggests that there are individuals out there who are capable of committing a terrorist act in Australia.'[18] However, most submissions did question whether the present security situation is as grave and immediate as, for example, the threat of attack on Australia and its territories by Japan in World War II.[19] The Federation of Community Legal Services (Victoria) drew attention to ASIO's assessment that the level of threat to Australia is 'medium' and submitted that a medium threat level does not justify emergency powers.

6.21 The Committee believes that it is important to try to be as measured and as accurate as possible in making assessments of threat levels.

6.22 Taking account of all the evidence received during the inquiry, and acknowledging that attacks are always possible, evidenced by the recent attacks in London and Bali, the Committee notes that ASIO assesses that the current threat level is medium.

The Sunset Clause

6.23 Three of the 113 submissions put to the Committee argued that the sunset clause should be removed from the legislation. These were

18 ICJ submission no. 60, p. 2.

19 Submissions from the Law Council of Australia no. 80 and the Human Rights and Equal Opportunity Commission no. 85.

submissions from ASIO, the Attorney-General's Department and the Australian Federal Police. The arguments of these agencies focused on the utility of the provisions and the professional way in which they had been exercised to date. All other submissions to the review argued strongly that the sunset clause must be retained. These submissions focused on legal principle and the extraordinary nature of the legislation, rather than the way it has been administered and its outcomes. To some extent the arguments have been at cross purposes.

6.24 ASIO argued that the sunset provision, section 34Y, should be removed, 'that the questioning and detention powers become a permanent part of the suite of counter-terrorism laws'.[20] Its reasons for this argument were that 'many of the concerns about how the powers might be used have been unfounded.' ASIO has not, and would not, waste resources or expose methods unnecessarily by using its powers excessively. [21]

6.25 The Attorney-General's Department argued that the sunset clause should be removed because the provision had worked well and provided valuable information within the framework of extensive safeguards and accountability mechanisms. The Department also noted that ASIO had adopted a responsible and measured approach to the use of its powers.[22] They further argued that a sunset clause was too inflexible and might coincide with a time of national crisis, taking resources away from protecting the Australian community.[23]

6.26 The Australian Federal Police argued that the laws should be permanent because 'the terrorism environment which required the establishment of the powers is unlikely to change in the near future.[24]

6.27 The starting point for many of the other submissions was that the powers were unnecessary, that the existing powers of law enforcement and the criminal code were sufficient to deal with the level of threat and that the threat level was not as great as dangers faced by the nation at other times. The overwhelming view was that the Division 3 Part III should not be renewed at all. However, most argued that, if the provision were to be re-enacted, it must contain a

20 ASIO transcript, public hearing 19 May 2005, p. 2.
21 ASIO submission no. 95, p.7.
22 AGD submission no. 95, p.28.
23 AGD supplementary submission no. 102, p.10.
24 AFP transcript, public hearing 19 May 2005, p. 6.

further sunset clause and that this should be accompanied by a further parliamentary review by this Committee.

> To go to your point about whether or not the sunset clause should be given a further date in the future: we would say yes. If we cannot have these detention powers and questioning powers stopped now and the normal criminal law standards effected, if we cannot achieve that as our first aim, then we would say, extend the sunset clause and keep a very tight view on it.[25]

6.28 In support of this view, it was very strongly argued that the powers must be considered as temporary and exceptional, that national security is important only insofar as it maintains our rights and liberties and that the legislation is inconsistent with basic democratic and judicial principles.[26] The Centre for Public Law believed that the detention powers, as yet unused, should not be re-enacted and the questioning powers, if re-enacted, should be subject to a further three year sunset clause.

> [The legislation] has got to be seen as an exceptional measure and, as such, there is not any reasonable basis for making it permanent.[27]

6.29 Dr Greg Carne also argued that the powers are exceptional and unprecedented. He believed that the sunset clause was necessary and made more necessary by the way the powers were expanded in November 2003 when the introduction of the secrecy provisions meant that scrutiny and public accountability, including over potential matters of illegality and impropriety, were dramatically curtailed.[28] Further, he believed that the experiential base for assessing the use of the powers so far is too narrow.[29] Finally, he argued that the abandonment of the sunset clause would be at odds with the Government's policy in *Australia's National Framework for Human Rights National Action Plan,* which says that the protection of

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25 Law Council of Australia transcript, public hearing 6 June 2005, p. 18.

26 Centre for Public Law submission no. 55, p. 3 and p. 9.

27 Centre for Public Law transcript, public hearing 20 May 2005, pp.27-28.

28 Dr Greg Carne submission no. 67, pp. 2-3.

29 Dr Greg Carne submission no. 67, p. 5. This view of the lack of an experiential base was put by a number of submissions, including the Federation of Community Legal Services, transcript, public hearing 7 June 2005, p.56 and Victoria Legal Aid, transcript, public hearing 7 June 2005, p.42.

human rights in Australia occurs not through a Bill of Rights, but through our parliamentary system.[30]

6.30 Various submissions rejected the view that the professional use of the powers justified their being made permanent. This argument was based on the view that the law itself was what mattered, not the intentions of the public servants.

> But there is always the risk that under different management we could see the extreme measures that are contained in the act being more aggressively used.[31]

> Even if one can show that, under the management of the capable and eloquent Mr Richardson, ASIO used its powers prudently it is no guarantee that they will be used prudently in the future – certainly when the sunset has passed.[32]

6.31 In respect of the Attorney-General's Department's argument that the review might coincide with a crisis and therefore be difficult to comply with, other submissions rejected this argument as having no merit. Mr Moglia from Legal Aid Victoria pointed out that 'it would never be convenient and that is why there are fixed periods for a sunset clause.'[33] Committee members reminded ASIO and the Attorney-General's Department that genuine public scrutiny was an integral part of public confidence in the operations of the powers and an essential safeguard.[34]

6.32 It was further argued that the fact of an inquiry, fixed in the context of the potential lapse of the legislation, did more than anything else to ensure the probity of its operation.

> But the advantage of the review is that people know it is going to happen, so there is just in the background another reason for complying with all the things that one needs to comply with and to exercise the act carefully.[35]

> A sunset clause providing public parliamentary debate is the most fundamental safeguard in a representative democracy.[36]

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30 Dr Greg Carne submission no. 67, p. 7.
31 HREOC transcript, public hearing 20 May 2005, p.14.
32 AMCRAN transcript, public hearing 6 June 2005, p. 5.
33 Legal Aid Victoria transcript, public hearing 7 June 2005, p.36.
34 Transcript, classified hearing 8 August 2005, p.19.
35 HREOC transcript, public hearing 20 May 2005, p. 25.
36 NACLC transcript, public hearing 6 June 2005, p. 28.

6.33 Mr Moglia argued that the process of review and the sunset clause were linked to a principle which required that the justification for continuing exceptional powers rested with the government and the parliament rather than the people.

> It is our submission that the onus rightly rests on the parliament to prove, to whatever standard, that there is a requirement for ongoing powers of this kind. It would be wrong to suggest that it is for the community to prove to parliament by lobbying or any other kind of review process that it [Division 3 Part III] should be removed. The onus lies with ASIO, this committee or the parliament in general to have specific exceptional reasons why these exceptional powers should exist. It is what has happened so far and it should continue. The onus should be on those who would grant powers rather than those who would seek to change the day to day laws.[37]

6.34 The Inspector General of Intelligence and Security affirmed that the use of the powers to date had been professional and that, therefore, in the short term, the sunset clause might not be necessary. However, he acknowledged the arguments put by other submissions of the 'role of detention historically in oppression' and, on balance, supported the continuation of a sunset clause albeit with a longer cycle.[38]

6.35 The Committee would also note that, in something so amorphous as a war on terrorism, where the end point might be difficult, or indeed impossible, to define, it is even more important that extraordinary legislation, developed to deal with these exceptional circumstances, be reviewed regularly and publicly to ensure that the extraordinary does not become ordinary by default.

6.36 The Committee finds the arguments in favour of retaining the sunset clause the more compelling. A sunset clause, which means that the legislation must be introduced anew, ensures that the public and parliamentary debate on the need for the powers will be regularly held and of the most focussed kind. The debate on the legislation will necessarily be more extensive if it must go through a Committee review, such as the current one, and then be debated as legislation in the chambers of the House of Representatives and the Senate. Only a

37 Victoria Legal Aid transcript, public hearing 7 June 2005, p.36.

38 IGIS transcript, public hearing 20 May 2005, p. 2.

sunset clause will achieve this. Anything else is potentially academic or indefinitely deferrable.

Conclusions

6.37 There is no state of emergency in Australia in the strict legal sense of the concept.

6.38 There are, however, for the foreseeable future, threats of possible terrorist attacks in Australia.

6.39 Some people in Australia might be inclined or induced to participate in such activity.

6.40 It is valuable to monitor such people, through ASIO's various intelligence gathering methods, to seek to prevent such possible actions.

6.41 The questioning regime set up under Division 3 Part III has been useful in this regard.

6.42 The regime has some deficiencies as discussed in this report and amendments should be made to the Act accordingly.

6.43 To date, the powers have been used within the bounds of the law and they have been administered in a professional way.

6.44 However, the powers are extraordinary and should not be seen as a permanent part of the Australian legal landscape.

- The whole range of the powers has not yet been exercised and therefore there is no basis to judge whether those powers not yet used are workable, whether they are reasonable, whether they would be used wisely, whether they are constitutionally valid.
- The period of the exercise of the questioning powers has been for only a very short time (two years prior to this review) and while they are subject to legislated controls, the capacity to scrutinise their operation, as they are used by a secret service, is not extensive and certainly not as immediate as is the case with the criminal justice system.
- They are subject to the quality of the administration of the service at any particular time.

6.45 Therefore, given the extent and nature of the powers and the secret nature of their use, scrutiny of the most rigorous kind must remain in place.

6.46 As they should not be permanent and should be scrutinised as thoroughly as possible, it is the Committee's view that the sunset clause must remain.

6.47 However, the Committee acknowledges that three years is a brief period of time for consideration of the operation of any legislation, particularly legislation that is to be used only as a last resort; therefore, the period of the sunset clause should be increased.

Recommendation 19

The Committee recommends that:

- **Section 34Y be maintained in Division 3 Part III of the *ASIO Act 1979*, but be amended to encompass a sunset clause to come into effect on 22 November 2011; and**
- **Paragraph 29(1)(bb) of the *Intelligence Services Act 2001* be amended to require the Parliamentary Joint Committee on Intelligence and Security to review the operations, effectiveness and implications of the powers in Division 3 Part III and report to the Parliament on 22 June 2011.**

Hon David Jull MP
Chairman