

To: Senate Standing Committee on Legal and Constitutional Affairs

## Independent Review of Terrorism Laws Bill 2008 (No 2)

Civil Liberties Australia supports this inquiry recommending a process to create an independent reviewer of terrorism law for what the process, and this inquiry, could achieve:

- restoring the traditional rule of law to Australia, by ameliorating aspects of legislation which was unquestionably created hastily;
- establishing the foundation for benchmarks against which current and any future laws could be measured; and
- hastening immediate repeal of sedition provisions of current laws (in line with Australian Law Reform Commission recommendations and as promised by the Australian Labor Party before the November 2007 election).

### A. Restoring the traditional rule of law to Australia

On 11 September 2001, pilots associated with a terrorist group tried to fly four large jet passenger aircraft into significant buildings in New York and Washington, USA. Two buildings, the Twin Towers in New York, were demolished after being hit by separate aircraft; a third jet hit the Pentagon in Washington, a part of which was severely damaged; the fourth aircraft crashed into a field. About 3000 people died.

On 12 October 2002, bombs detonated in the nightclub area of Bali killed 202 people, including 88 Australians. On 1 October 2005, other bombs killed 19 people, of whom four were Australians.

On 7 July 2005, four bombs exploded on trains and a bus in London, killing 56 people, injuring 700 and paralysing the city.

These and associated events causes a spectre of fear to girdle the earth. Citizens became afraid. Executive governments particularly became overly alarmed that a terrorist attack might happen "on their watch". They reacted in crisis mode<sup>1</sup>, with legislation that was excessive. Within police and security services, a similar 'not on my watch' fear was overlaid by an opportunism to secure more resources – people and money – and to bring in toughened laws that would have been considered extremist just a year or two earlier.

Australia, in a matter of months:

- passed new laws aimed at preventing terrorist attacks (by boosting surveillance, particularly of certain behaviours, communications and financial transactions), and catching terrorists and their supporters after an event. These new laws extensively impinged on traditional liberties and rights, and formal legal protections (see below).
- massively boosted police and security numbers and spending (roughly twofold to threefold, with ASIO for example gaining a funding increase of about 345% over five years, and going from about 600 employees to 1860 over six years: even now, seven years on, the numbers are still climbing);
- dramatically ramped up police, military and security contacts and intelligence sharing internationally, and with Indonesia in particular, including building a jointly-run police/security training college there; and, as a result of the above developments,

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<sup>1</sup> ... AUSTRALIA'S new envoy for international counter-terrorism, Bill Paterson... Mr Paterson said counter-terrorism strategies should continue to shift away from short-term "crisis management" to identifying and addressing sources of radicalisation. "When I led the government's anti-terrorism task force after September 11, it was ... a crisis management role. My role is now to look to diminishing the threat by addressing the longer term." <http://www.smh.com.au/text/articles/2008/09/09/1220857547401.html> *New Directions for Australia's Terrorism 'Envoy': Terrorism envoy's close calls in fatal attacks*, Sydney Morning Herald, 10 Sept 2008

- reversed a 40-year trend<sup>2</sup> towards a more civil liberties and human rights-oriented society in Australia.

A much smaller amount of funding and effort, relatively, was put into trying to create closer links with ethnic communities in Australia, particularly among Muslims, and in advertising to heighten 'public awareness' in Australia.

### **Anticipating an inquiry**

CLA in late-2006 anticipated the need for some sort of a review along the lines proposed by the Bill under question. We commissioned a three-month study of the 'terrorism laws' passed after 11 September 2001 (to December 2006). The report, by CLA member and ANU law student, Amanda Alford, was done under a formal internship program in the Senate from December 2006 through February 2007. The report includes recommendations, of which many will be of interest to the Committee, particularly VIII and XII on p22.

The Alford Report<sup>3</sup> found that, in the (then) five years since 11 Sept 01, Australia had spent \$10.4 billion on security<sup>4</sup>, and Parliament has passed 50 new anti-terrorism laws – they are listed in the report. Since then, a small number of additional laws/amendments have also been passed.

Of necessity, given unprecedented circumstances, the legislation was passed in much more haste than usual and – like the concurrent expenditure – was scattered rather than targeted after careful evaluation and detailed analysis.

With seven years elapsed since the first attacks, the Parliament is now in a position to set up a system to review what was done in terms of legislation and to analyse whether – with the benefit now of hindsight – what was done was inadequate, too extensive or just right.

CLA believes it the new systems have proven to be too extensive for these reasons:

- crimes and security (ASIO) legislation existing in 2000 were sufficient to deal with the terrorism threat – in no case over the past seven years have the additional powers been needed to apprehend or prosecute a suspect beyond what was needed and could have been used more than adequately under previous legislation; and
- in virtually every major public case<sup>5</sup> involving 'terrorism' aspects since 2001, police, security, jail or other authorities have been demonstrated to have exceeded what Australians consider the traditional rule of law, or proved to be less than competent exercising powers way beyond those traditionally given to such bodies.

Police and ASIO have been shown to be unworthy of the additional powers. They were massively criticised by Justice Michael Adams in the UI Haque case in Sydney for acting illegally, beyond their already excessive powers, in questioning a suspect and 'kidnapping' him off a suburban street. In Melbourne, the ruling of Justice Bongiorno in relation to the conditions of detention in a major terrorist trial this year showed how authorities entirely disregarded the rights of charged, but unconvicted, individuals.

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<sup>2</sup> See: <http://www.cla.asn.au/> **Now is the Winter of Civil Liberties: Kennan**, an analysis by former Victorian Attorney-General, Jim Kennan SC (posted 12 Sept 08)

<sup>3</sup> It is available at: <http://www.cla.asn.au/page/students.php> entitled: **The Alford Report: seeking the balance for freedoms**

<sup>4</sup> Expenditure rose considerably on this sum because of APEC in Sydney, mostly held around September.

<sup>5</sup> Scott Parkin, US activist deported on secret information which ASIO continues to refuse to disclose under court order; Jack Thomas case, where police and security services had to use a TV current affairs program before they could secure a conviction; Dr Mohammed Haneef, locked up and administratively detained in a travesty of the Australian system of a 'fair go'; and David Hicks, detained and tortured by the USA, rendered back to Australia a broken man, then gagged and locked up in Australia in collusion with illegal US 'law' manufactured by the US Administration.

Not only in Australia, but in the UK, police have been found incapable of exercising the extra powers appropriately. London police killed an innocent man on a train because of over-eagerness to pull the trigger, showing that suspicion is enough proof under a new police and security way of thinking, encouraged by excessive powers granted in laws passed in haste.

In the week ending 12 September 2008, of eight men charged in the UK with major offences in relation to liquid explosives on planes, one was found not guilty on all counts, and four were convicted of committing a public nuisance. Only three were found guilty of conspiracy to murder...and even they were not found guilty of conspiring to detonate explosives on an aircraft. Police had the suspects under surveillance for three months, but still could not ultimately secure the conviction sought.

Because of this British police over-reaction and ineptitude, the entire globe was subjected to massive disruption at every airport in the world. The non-bombers' case in the UK illustrates the danger to normal society of abnormal police and security actions permitted under terrorism laws passed in Australia since 2001.

The laws therefore need review. They should be commensurate with what Australians consider to be a 'fair go', or what might be termed the tradition rule of law in this country. For the above reasons, CLA strongly supports a review.

Specifically, laws relating to these elements at least require analysis, re-thinking and re-drafted, better legislation:

- sedition
- habeas corpus
- detention without charge
- detention of minors
- 'control' orders
- right to a lawyer of choice
- freedom to communicate after being detained
- freedom of assembly – guilt by association
- right to privacy unless reasonable doubt (communications, financial transactions)
- freedom of normal communications in normal circumstances (mail, email, phone, fax, etc)
- removal of tapping third party' communications
- protection of the home from secret police/security invasion and planting of electronic devices
- elimination of strict liability
- reversal of the onus of proof

In conjunction with this list, please see the attached cartoon at the end of this document. It sums up how easily Australians have lost traditional civil liberties in the space of just seven years...and how hard it will be to get them back.

## **B. Establishing a foundation and/or benchmarks against which to measure**

While CLA supports a review of the terrorism laws, Australia does not have clearly-delineated, national benchmarks against which to measure whether laws are excessive or not.

Other countries typically utilise a charter (or bill) of rights and responsibilities mechanism for this important function. It is planned that introducing one to Australia will soon be the subject of public debate: \$2.8 million was allocated for this purpose in the 2008 Federal Budget.

CLA supports the need for a Charter of Rights and Responsibilities in Australia. However, we believe that it is unlikely to eventuate in this country in the near (1-3 year) future, and is of no use in analysing how to implement an independent review of terrorism laws in the shorter term.

What is required, as forerunner to any independent review, is broadly-based discussion, analysis and then decision on what civil liberties and human rights criteria should apply as the foundation – or benchmarks – for measuring the old, excessive legislation, and establishing new laws commensurate with Australians’ traditional liberties and rights...the notion of a ‘fair go’.

If Parliament decides there is to be an independent reviewer of terrorism laws, it is vital in our opinion that such benchmarks be set in conjunction with, and simultaneously with, the operation of that office.

Otherwise, any reviewer and staff would be operating to self-selected criteria, which may or may not reflect a more considered, wider, open and transparent decision-making process on what is fundamental, not just for reviewing the terrorism laws of the past seven years, but all Australian laws, past, present and future.

CLA, while supporting the national push for a charter of rights and responsibilities, wishes to propose that the Senate Standing Committee on Legal and Constitutional Affairs holds a public inquiry into what are Australians’ civil liberties and human rights.

We suggest that such an inquiry would:

- take evidence throughout Australia for 12 months, hearing what the people say and want;
- produce (over the period of the following 6 months) a draft foundation statement – or a series of benchmarks – about what Australians’ civil liberties and human rights should be in the early 21st century;
- allow sufficient time (9 months) for further consultation and debate, on the draft; and
- propose a new way of introducing the foundation statement, or benchmarks, into the Australian way of life (for example, by a simple piece of federal legislation, by mirror legislation federally and in every State and Territory, by a statutory Charter of Rights and Responsibilities, or by Constitutional amendment); and
- champion the foundation statement/benchmarks into Parliament to be passed as legally binding.

We believe the necessary work could be undertaken by a secretariat of about 8-10 people for about three years undertaking a process/inquiry as outlined broadly above. At the conclusion of the consultation period, with draft benchmarks established, the secretariat could become the staff of the “Independent Reviewer of Terrorism Laws” for, say, a two-year period

We propose that there is:

- a review, led by the Senate, which operates for about 3 years, then
- an Independent Review of Terrorism Laws, headed by an statutory Independent Reviewer utilising the secretariat staff, which would begin to operate at the end of the initial (approximately) three-year period.

We suggest that it may be possible to divert the existing funding of \$2.8m, already approved for ‘human rights consultation’, to the process we have outlined, because the outcome under our proposal would equate to a charter, or foundation, or benchmarks document.

### **Terrorism laws have done the nation a service**

CLA believes that the terrorism laws, though passed in haste, have actually done Australia a great service. They have shown conclusively there is an urgent need to scope and define our national liberties and rights. Our founding fathers didn’t address the issue in any detail, so it is unfinished business as far as our constitutional development is concerned.

However, before we can ‘independently review’ the terrorism laws, we need a system and structure against which to hold the review.

CLA has outlined such a process, and recommends it to the Committee.

### C. Hastening immediate repeal of sedition provisions of current laws

In making this suggestion, we in no way endorse delaying, for even one more day, the repeal of the sedition laws currently operating in Australia.

The then-Howard Government Attorney-General, Mr Ruddock, promised to review the laws if the Parliament would pass them without delay. The Parliament did so. The ALRC reviewed the laws. They produced recommendations, which were tabled on 13 September 2006, two years ago.

No Member of Parliament, so far as we are aware, opposes any of the ALRC recommendations, which are a sensible step forward to have 21st Century law in Australia, rather than politically-based laws more redolent of the 17th Century.

The Australian Labor Party policy, as expressed before the 2007 federal election, is to abolish the current sedition laws in keeping with the ALRC recommendations.

CLA asks the committee to recommend, as part of the current inquiry, that the Government and Parliament act immediately to remove the current sedition laws and replace them with the ALRC-recommended version.

ENDS ENDS ENDS



...thanks from CLA to John Ditchburn, Inkcinct Cartoons, Ballarat, Victoria <http://www.inkcinct.com.au/>

Submitted on 12 September 2008 by:

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