NSW Council for Civil Liberties Inc.

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Submission to the Independent National Security Legislation Monitor, October 2012

The New South Wales Council for Civil Liberties (NSWCCL) is one of Australia's leading human rights and civil liberties organisations. Founded in 1963, NSWCCL is a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. To this end the NSWCCL attempts to influence public debate and government policy on a range of human rights issues by preparing submissions to parliament and other relevant bodies.

The NSWCCL thanks the Independent National Security Legislation Monitor (INSLM) for the invitation to make this submission.

> 'The claim that if you want security you must give up liberty has become a mainstay of the revolt against freedom. But nothing is less true. There is, of course, no absolute security in life. But what security can be attained depends on our own watchfulness, enforced by institutions to help us watch – i.e. by democratic institutions which are devised to enable the herd to watch, and to judge the watch dogs'. (Karl Popper, The Open Society and Its Enemies: Volume One, Routledge Publishers, London, page 355, ISBN 041523731).

Introduction

In recent years Australia has in unprecedented ways attracted the interest of terrorists and there are now citizens born in Australia who are attracted to the idea of performing terrorist actions here. Here is not the place to examine why this has come about; CCL acknowledges that the threat of mass murder requires our response to concentrate on the prevention of the crime, not just on its detection and punishment.

Although terrorism has been a problem for hundreds of years, the Twin Tours attack in New York and the London and Bali bombings led to the passage of a great deal of legislation which might have been justified if the problem, like a war, could be expected to be concluded in a few years. However, it is plain—indeed, it was always plain— that terrorism is not going away. Included in the laws are measures which reduce civil liberties, and others which place liberties under serious threat. It is time to consider which of the laws we have passed should be kept, which modified, and which should be repealed.

The need for a Bill of Rights

Since the events of 11 September 2001, democratic parliaments across the world have passed legislation to combat the threat of terrorism at home and abroad. Australian legislation is a particular

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threat to freedom, for in all other democratic jurisdictions the legislation is open to judicial review with respect to a Bill of Rights.

For example, in the UK the House of Lords found that the indefinite detention of foreign nationals without trial under the Anti-terrorism, Crime and Security Act 2001 is a breach of the European Convention of Human Rights.[1] The Canadian Supreme Court has struck down similar legislation that authorised the non-reviewable indefinite detention of non-citizens for security reasons.[2]

Without a Bill of Rights, the courts in Australia are unable to protect people in this way from laws that violate fundamental principles of international human rights law; that expose Australians and aliens to risks to their liberties.

The Monitor's questions

Questioning warrants

1. Is the last resort requirement for a questioning warrant under the ASIO Act too demanding? (29-30)

At present, as the Report points out, questioning warrants cannot be issued, ultimately, unless reasonable official views are formed that a warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence, and that relying on other methods of collecting that intelligence would be ineffective.

It is submitted that the test is not too high. As a gross invasion of normal human rights it should be high.

It is apparent that there appears to be a conflict with the warrant itself in so far as it purports to only seek information that is or may be relevant to intelligence that is important.

Furthermore it is apparent that even if the questioning fails to produce any useful intelligence there is no remedy to retrospectively invalidate the issue or use of the warrant.

2. Are the time limits (e.g. 7 days detention for 24 hours questioning) applicable to questioning warrants too long, too short or about right? (30-32)

It is the Council's opinion that a time limit of 7 days for a detention warrant is excessive and no citizen should be held uncharged for a period in excess of 24 hours. 168 hours is demonstrably excessive and smacks of interrogation techniques designed to break the subject by a combination of intimidation and exhaustion.

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[1] *A & others v Secretary of State for the Home Department* [2004] UKHL 56.

[2] *Charkaoui v Canada* (2007) SCC 9.

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It is further our view that no citizen should be subject to interrogation for more than 8 hours

Further to this we note the various ways in which the period can be extended to 24 hours and with the various devices provided for under S34R (14) can be dramatically extended to stretch over days and nights.

3. Are the time limits for questioning warrants where interpreters have been used commensurate with the limits applying otherwise? (31-32)

It is our view that it is likely that many persons will accept the offer of an interpreter in the belief that it will enable them to express things better and possibly that the interpreter will be impartial. Cynically under the present system offers will be made to enable an extended period. It is our view that the period should be no longer than 8 hours--again we note how it can be extended under 34(R)14

4. Are there sufficient safeguards including judicial review in relation to the surrender or cancellation of passports, in connexion with questioning warrants? (32)

It is apparent that the person can be the subject of a 5-year prison sentence for failing to deliver up a passport or going overseas even though no warrant ever issues; and despite a definite decision not to issue a warrant.

It is submitted that the penalty of 5 years for failing to deliver a passport is draconian and it should be replaced by a fine

It is apparent that although the passport should be returned at the end of the warrant -28 days- succeeding warrants can and are used to nullify this provision

There is no requirement of non-disclosure of the contents to potentially hostile authorities e.g. reveal trips to Israel to anti Zionist governments

There is no specified procedure of independent judicial review. At present 34ZW appears to block a person seeking a remedy before a state or territory court.

Is the 5 years imprisonment for failing to answer questions truthfully etc under a questioning warrant appropriate and comparable to penalties for similar offences? (32)

It is submitted that the penalties are both excessive and inappropriate for what may be the product of either stupidity or negligence.

It is submitted that the maximum penalty should be 2 years to enable the offence to be dealt with in a lower court:

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It is further submitted that offences and penalties should be directed towards those who deliberately seek to deceive etc. To apply appropriately, S 34 L should be amended to
34L(1) Insert the words "unless possessed of a reasonable excuse" or some such similar
34L(2) should be amended to insert "knowingly" between "must" and "give"
34L(6) should be amended by inserting "knowingly" between "not" and "fail"
Remove the references that shift the onus onto the person to prove a negative.

5. Is the abrogation of privilege against self-incrimination under a questioning warrant sufficiently balanced by the use immunity? (32-33)

The immunity is essential. People may be confused, upset, or in shock. Anyone from a culture were police are distrusted—including Aboriginal people, but also many migrants—is likely to react badly when questioned. They may be terrified, especially if they come from a country where a knock in the night commonly leads to disappearance and death. Aboriginal people, as the Royal Commission into Aboriginal people in custody found, find custody oppressive, and are likely to be amenable to suggestion. Anybody may be emotional, panicked, inarticulate or confused. They may be affected by alcohol or drugs.

People newly arrested will have difficulty in remembering the past clearly without thinking about it in calmer circumstances. They are likely to give confused or conflicting answers. They may exaggerate, or give partially untrue answers.[3]

But the immunity may not be enough. As usual the problem arises not so much from the direct use of the information but the indirect use of it which may lead to further information and the laying of criminal charges.

6. Do the conditions permitting use of lethal force in enforcing a warrant sufficiently clearly require reasonable apprehension of danger to life or limb? (33)

It is submitted that the answer to the question posed is "No".
(i) The use of force is not limited to taking a person into custody under a warrant see (a)(ii)(b); it can include where a police officer is acting under a direction.
(ii) The test of "necessary and reasonable" is a subjective one; the test of ' believes on reasonable grounds" is also subjective. Both should be replaced with a more defined objective test.
(iii)The direction to refrain from doing anything that is likely to cause the death of, or grievous bodily harm to, the person is deliberately abrogated if the person is attempting to escape <u>being taken into custody</u>. It appears that greater protection may be provided if the person is already in custody.
(iv) No penalty is provided for a breach of this section. It is not clear whether this vacuum will in all cases be adequately filled in by the criminal law.

[3] They may for instance assert what they think *must* have been the case, rather than what they remember.

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In our submission no aspect of escape or attempt to escape (which is likely to bring in some confrontation with the police officer which could in turn be described as possibly going to cause serious injury) can justify the use of force that is likely to cause the death or grievous bodily harm to the other person. The provision justifying or partially justifying the use of such force in such circumstances should be deleted.

Questioning and detention warrants.

7. Are the three several conditions for issuing a questioning and detention warrant stringent enough? (34-35)

Questioning and detention warrants constitute an unnecessary extension of executive powers and a disproportionate imposition on personal liberty.

Given that being taken into custody on a questioning and detention warrant, without charge are significant erosions and diminutions of liberty such warrants should only be issued under stringent safeguards. It is our submission that such warrants should only be issued under the hand of a judicial officer.

We are further of the view that the ASIO Act should be amended to redraft the tests.

At present the ASIO act provides that a detention warrant may issue if there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person:

(i) may alert a person involved in a terrorism offence that the offence is being investigated; or

(ii) may not appear before the prescribed authority; or

(iii) may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.

It is submitted that the tests are set at a level that is far too low to provide any real protection:-

(i) Reasonable grounds is not defined

(ii) It is not apparent whether it is supposed to be an objective tests

(iii)The basis of the "reasonable grounds" does not have to be identified;

(iv)The use of "may" requires not even the lowest range of likelihood. It is submitted that in each case it should be replaced by "will" or, at the very least, the test should be either "highly likely to". With respect to the 3rd test the word "knowingly" should be inserted after "will"

Should the risk of non-appearance as a condition for issuing a questioning and detention warrant require assessment by a judicial officer? (34) And Should the issuing authority, being a judicial officer, rather than the Attorney-General, or as well as the Attorney-General, determine the existence of a condition for the issue of a questioning and detention warrant? (35)

It is submitted that the risk of non- attendance should have to be assessed by a judicial officer, but there is no reason why in respect of each of the 3 criteria the assessment should not be made by an independent judicial officer.

Is the disparity between length of imprisonment for offences against security obligations in

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relation to questioning warrants and for offences of deliberate contravention of safeguards in relation to questioning warrants appropriate? (35)

It is highly unlikely that any officer of official breaching the requirements will ever face prosecution but so long as the offences are as set out in the Act there would seem to be no good reason why they should not be the same. I.e. if the latter penalties (contrary to our submission above) remain at 5 years that should be the penalty.
As set out above there appears no penalty for contravening or attempting to contravene any prohibition against the use of excessive force, and it is also noted that as drafted the Division does not affect the function or power of a person under Part V of the Australian Federal Police Act.

Is the degree and nature of permitted contact by a person being questioned under a warrant sufficient? (35-36)

The Act imposes severe and stringent limitations on contact with a person the subject of a warrant. In particular 34K 10 provides that a person taken into custody or detained is not permitted to contact and may be prevented from contacting anyone at any time whilst in custody or detention. It is possible to do so if the warrant specifically allows it, but absent that any contact even with the person's spouse is prohibited. Further provisions prevent even the disclosure of the existence of a warrant (for up to 2 years afterwards) subject to heavy imprisonment penalties.

There have been a number of cases where spouses have been driven almost frantic by the sudden disappearance of persons. It is not hard to imagine the strains that an inability to explain a week's absence could have on a marriage.

It is submitted that disclosure of at least the existence and well-being of the person should be permitted.

There are also a number of limitations on access to lawyers. These include the requirement that the person designate a single lawyer which they know and when at or before a hearing limiting contact with a lawyer so it can only be made in a way that can be monitored by a person exercising authority. It is submitted that these strictures should be removed.

It is further submitted that legal representatives should be permitted a greater role in hearings. At present the only objection that can be taken is on the grounds of ambiguity. At the least objections should be able to be taken on the grounds of fairness or natural justice.
Anecdotal evidence is that certain lawyers who have experience in so called "terrorism" allegations and trials are routinely excluded.

It is submitted that the power to prevent a person contacting a particular lawyer of his choice if exercised should immediately be reviewable by a judicial authority; and any exercise of the power that enables a person before a prescribed authority for questioning under a warrant to be questioned under the warrant in the absence of a lawyer of the person's choice be stayed until any such application is made.

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Should questioning and detention warrants remain available at all? (11-12, 34-35)

There can be no argument that the use of such warrants is a grave derogation of fundamental rights as they have been established under the common law and particularly the prohibition against incarceration without charge. They are a breach of Australia's obligations under article 9 of the International Covenant on Civil and Political Rights.

To justify such derogation of the rights of individual persons there would have to be a clearly demonstrated great public good established. Police and other agencies are always likely to assert that the end has justified the means and that intelligence (which cannot be disclosed or examined for national security reasons) has and can best be obtained by such means. It is submitted that such propositions should not be accepted without close consideration by the Examiner. For although only 24 hours of questioning may be carried out in this period, the excessive time spent waiting in an oppressive environment not only threatens the emotional and mental well-being of the detainee but also raises serious doubts about the credibility of their evidence.

Control orders and preventative detention

> *[T]he involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.*[4]

Should anything be done about doubtful aspects of the constitutional validity of control orders and preventative detention orders under the Criminal Code? (47-49)

Both types of orders, but particularly the former, which can continue for up to 10 years, are grave derogations of fundamental rights. Such restrictions on liberty should only be imposed as part of criminal sentences after conviction. Their constitutional validity including the roles of the Attorney General and the Minister should be tested inter-alia in terms of their compliance with Australia's treaty obligations under the ICCPR and other treaties. Superficially such orders contravene the reasoning of the High Court in Veen (no1) and Veen (no 2).[5]

Do international comparators support or oppose the effectiveness and appropriateness of control orders and preventative detention orders? (48-49)

The Council is not aware of any material from advanced democracies (excluding the USA) supporting the effectiveness of control and preventative detention type orders. We are aware

[4] Brennan CJ, Deane and Dawson J in Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 at 27:

[5] Veen v R [1979] HCA 7; (1979) 143 CLR 458 (28 February 1979); Veen v R (No 2) [1988] HCA 14; (1988) 164 CLR 465 (29 March 1988)

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of problems in Ireland, where detention was counter-productive, and in South Africa under the apartheid regime, where revolving door detention became a means of oppression.

Does non-use of control orders and preventative detention orders suggest they are not necessary? (48-49)

The non-use of such orders clearly militates against any argument that they are necessary and any argument that they should be more readily available.

Should control orders and preventative detention orders require a relevant prior conviction and unsatisfactory rehabilitation? (48-49)

It is submitted that control orders should be limited to part of a sentence imposed after conviction and should not extend beyond whatever prison term is imposed. Using preventative detention after a sentence has been served because of unsatisfactory rehabilitation would be clearly contrary to the principle endorsed in Veen (No 1) and Veen (No 2).

If control orders are imposed as an alternative to prison in circumstances where there has been some problem with rehabilitation, that latter criterion should only be available as an aggravating factor, proved beyond reasonable doubt at sentencing, and the orders should be for no more than 2 years.

A person can be subject to a control order or preventative detention order when they have not committed any offence. Indeed, the measures are designed to deal with situations where there is insufficient evidence to charge a person with a criminal offence. A person need not be suspected of planning or preparing or being involved in committing a terrorist offence.

Control orders may amount to house arrest, and in any case they infringe maximally on a person's liberty. For a person to lose liberty, and not to be told the grounds on which the orders are made, so that any appeal is frustrated before it is made, would be an outrage. Yet that it not only possible, but encouraged by the National Security Information (Criminal and Civil Proceedings) Act 2004.

The legislation is most likely to be misused in the circumstances for which it was made—where a terrorist act is feared, or where one has occurred. Once it has been misused, the misuse is likely to continue—as security legislation in Singapore has been. At its extreme, it can lead to the frustration of democracy, and might foment civil strife—as preventative detention, misused, did in Ireland.

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