Civil Liberties Australia (ACT) [CLA(ACT)] thanks the opportunity for the opportunity to comment on the *Terrorism Extraordinary Temporary Powers) Bill 2005* (ACT). We wish to make a number of comments – some dealing in more general terms with the purported rationale said to make such extraordinary laws necessary, and others addressing the text of the Bill itself.

We question the necessity for such laws. It is our submission that current laws are sufficient. On 19 May 2005 the former head of ASIO, Dennis Richardson, was asked by Senator Robert Ray when appearing before the Parliamentary Joint Committee into ASIO, ASIS, and DSD, whether he was "satisfied that the existing powers equip you to do the job you need to do." He replied "Yes."[1] On the morning of the COAG meeting of 27 September 2005, Queensland Premier Peter Beattie said that the Qld police have advised him that they are not being hampered by a lack of powers and that "they're comfortable with where they are."[2] Surely the same type and nature of threat that exists today existed in May 2005.

CLA(ACT) accepts that there are people in the community intent on doing Australia and its citizens harm. But that threat, and the extreme curtailment of fundamental rights and freedoms that underpin our society, need to be put into perspective.

In 2005 there were no terrorist attacks in Australia. At the same time there were approximately 1600 people killed on Australian roads[3], and 10 people struck by lightning[4]. If we are to accept the arguments of the proponents of the new anti-terror laws – that what is in reality a threat that at its most extreme will only result in a comparatively small number of causalities justifies a demonstrable attack on our

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[1] *Commonwealth Parliamentary Debates,* Parliamentary Joint Committee on ASIO, ASIS and DSD, transcript of public hearings, Canberra, 19 May 2005.
[2] Transcript of radio interview, ABC 'AM' Program, reporter: Alexandra Kirk, *"Premiers seek proof anti-terror laws are necessary*", 27 September 2005.
[3] See "Road Safety South Australia", http://www.transport.sa.gov.au/rss/content/safer_people/programs_resources/2004_road_toll_review.htm
[4] Australian occupational Health and Safety Index, http://www.safetyline.wa.gov.au/pagebin/injrsign0209.pdf

fundamental freedoms – then the following question beckons: given that the threat to community safety from road accidents or obesity makes the threat from terrorism look minute in comparison, why then have respective governments not passed such draconian laws with respect to those who might pose a threat to road safety? We offer a cynical answer. To pass such laws is not politically expedient.

The impetus for recent anti-terror legislation appears to have come largely from the Federal Coalition government. They have and continue to engage in the politics of fear. By exciting the public's emotions and fears and appealing to the frailties of human nature, many unscrupulous politicians are doing the unforgivable – they are exaggerating a problem; scaring people and making them feel insecure, only to then put themselves forward as the saviours of society. In this case, by passing draconian laws.

Laws born out of fear are never desirable. It was Thomas Jefferson, a founding father of American democracy, who rightly said that "he who is prepared to sacrifice his freedom for some temporary safety is deserving of neither freedom nor safety." In response to a question on what Australia should do in response to terrorist attacks, the Prime Minister, John Howard, said that "we have to live our lives, we can't be frightened to live, otherwise the terrorists win."[5] It is often said that in the face of terrorism we can never give in or change our way of living, otherwise the terrorists win. CLA(ACT) agrees with these sentiment.

Unfortunately, recent anti-terror laws have achieved a result at odds with these principles. The proponents of recent anti-terror laws have faltered; they have blinked in the face of terrorism. They have proposed laws which substantially detract from our commitment to fundamental democratic freedoms and human rights; a clear change in our way of living in response to the terrorists. These are changes which the terrorists would welcome. As such, these laws represent a victory to terrorists.

[5] Transcript of interview between the Prim Minister and Glenn Milne, Channel Seven News, 14 October 2002.

It is our submission that the attack on fundamental and democratic rights implicit in the proposed anti-terror laws is not proportional to the threat from terrorism, especially when considered in light of the absence of attacks on such freedoms from other more serious threats to community safety such as traffic deaths.

That said, we do note that the provisions contained in the ACT Bill are an improvement on those contained in the *Anti-Terrorism Bill 2005* (Cth). They do have enhanced safeguards on fundamental civil liberties and are not as offensive to our basic standard of decency and freedom as the provisions of the Commonwealth Act are.

AFP COMPLIANCE WITH HUMAN RIGHTS LEGISLATION

CLA(ACT) has concerns over the attitude of the Community Policing section of the Australian Federal Police to territory legislation. It appears that the AFP has a disposition towards exploiting its unique situation as a Commonwealth Agency which contracts its services to the ACT to "pick and choose" which legislation it feels obliged to adhere to.

For example, the AFP refuses to comply with the *Public Interest Disclosure Act 1994* (ACT), which is essentially ACT legislation designed to expose incidents of corruption and wrong doing by government agencies, and promote general public accountability. Section 11 of that Act provides that government agencies will outline their compliance with the Act and to list statistics relating to public interest disclosures made during a year. Part 2.2. of the *Annual Report (Government Agencies) Notice 2005* (Notifiable Instrument NI2005-237) lists the Chief Police Officer as someone having to comply with these requirements: see also Part 3.4 of NI2005-237). However, in their Annual Report, the Community Policing section of the AFP flatly refuses to comply with these requirements, saying that "as a Commonwealth Government Agency, and due to the nature of our business, it is not appropriate for the AFP to report under the *Public Interest Disclosure Act 1994.*"[6] Given the nature of their business, the AFP, more than any other

[6] AFP ACT Community Policing Annual Report 2004-05, page 103.

agency, should be bound to comply with the anti-corruption measures contained in this Act. It is clearly not for the AFP to decide what to report on – that was done by force of law through by ACT Legislative Assembly.

CLA(ACT) has concerns that if the AFP was found to be non-compliant with the *Human Rights Act 2004,* the AFP might adopt a similar attitude to that Act as it has with *Public Interest Disclosure Act*, and declare itself to be exempt on account of its being a Commonwealth agency.

CLA(ACT) believes that it is important that it is important that ACT Government seeks urgent advice to ensure that ACT legislation is binding on the ACT Community Policing section of the AFP. Moreover we would seek a declaration from the Community Policing section of the AFP that it is bound and will adhere to all ACT legislation, including the *Human Rights Act,* in all respects.

PREVENTATIVE DETENTION REIGIEME

We note that in section 3 of the preamble of the Bill it is asserted that any new law must be, *inter alia,* "necessary" and "effective against terrorism," and section 8 of the Bill provides that the purpose of the preventative detention regime is to "prevent terrorist act that is imminent.."

We reject that these laws are necessary, as pre-existing laws are adequate to deal with the threat of terrorism. It is already the case that if two or more people are planning or preparing to commit a terrorist offence, then they are conspiring to commit such an offence. Section 48 of the *Criminal Code Act 2002* (ACT) provides that it is an offence to conspire to commit an offence. The penalty for engaging in a criminal conspiracy is equal to the penalty for the offence that the parties have conspired to commit: see *Criminal Code Act 2002* (ACT), s 48(4). Moreover, if the police or other law enforcement agencies suspect on reasonable grounds that someone is conspiring to commit an offence, they can arrest that person and take them before the courts, where the

accused may be denied bail and held on remand: see *Crimes Act 1900,* s 212; *Bail Act 1992* (ACT). Similar provisions apply when a person is not planning to commit a terrorist act, but is in some other way knowingly concerned, that is to say, they are complicit: see complicity provisions in *Criminal Code Act 2002* (ACT), s 45. Again the police can arrest in such cirumstances and the courts can deny bail with respect to complicity offences. The existence of laws already enabling terror suspects to be arrested and detained clearly shows the proposed preventative detention regime is born out of political expediency and not necessity.

UNMOLESTED ACCESS TO LAWYERS

Section 53(2) of the Bill provides that it is possible for the police to monitor, if certain conditions are satisfied, conversations between a lawyer and a person held in preventative detention. It is our submission that such a submission is highly objectionable. CLA(ACT) notes with approval the findings of the Australian Law Reform Commission with respect to communications between lawyers and their clients:

> …the proper functioning of our legal system depends upon freedom of communication between legal advisers and their clients which would not exist if either could be compelled to disclose what was passed between them for the purpose of giving or receiving advice.[7]

Clearly if the police are listening in on a conversation, the client will be reluctant to talk frankly and freely. We note that it is often the case that an accused person might be involved in some degree of wrongdoing which is why they have come to the attention of authorities in the first place, but they are often not guilty of crimes of the seriousness alleged by the police. This means that if section 53 of the Bill were to be enacted in its current form an undesirable paradox may arise in that a person responsible for minor wrongdoing is wrongfully convicted of a more serious offence because they have not properly communicated with their lawyer out of fear of being convicted of the less

[7] Australian Law Reform Commission Report 26, vol 1, para 878, quoting *Baker v Campbell* (1983) 153 CLR 52 at 128 per Dawson J.

serious offence. It is our view that it is in the public interest that some incriminating evidence is denied from authorities if that is what it takes to protect innocent or undeserving people from wrongful conviction: one of the few things worse than a guilty person getting away with a crime is an innocent person paying for someone else crime.

As such, CLA(ACT) recommends that section 53 be omitted from the Bill.

Issues involving the admissibility of evidence obtained under section 53 of the Bill arise. It would appear, *prima facie,* that section 53 would have no impact on the operation of sections 118 and 119 of the *Evidence Act 1995* (Cth)[8] which provides that confidential communications between clients and lawyers are inadmissible in legal proceedings. It is extremely important that that should remain to be the case. Should the committee recommend that section 53 of the Bill remain, care should be taken to ensure that it can in no way undermine the operation of section 118 and 119 of the *Evidence Act*. We recommend that a sub-clause to this effect be included in section 53 should the committee decide to keep this section. Moreover, the inclusion of a provision reiterating the fact that nothing contained in communications monitored by the police might go some way to alleviating the problems discussed earlier; accused persons would be less likely to worry that what they say to their lawyer will be used against them.

Should section 53 be retained in its current or a similar form we would also propose an additional safeguard. Where a senior police officer has issued a direction that a conversation be monitored because he or she believes that one of the grounds set out in section 53(2) will be satisfied, and after monitoring the communication, evidence, information or intelligence relevant to a section 53(2) ground has not bee disclosed, then that evidence intelligence or information should be destroyed.

COMPENSATION FOR EXERCISE OF SPECIAL POWERS

[8] It needs to be remembered that the Commonwealth *Evidence Act 1995* applied to proceedings in ACT Courts.

Section 85(3) of the Bill provides that a court may order the payment of "reasonable compensation for the loss or expense only if it is satisfied it is just to make the order in the circumstances of the particular case."

This provision appears to contain a drafting error in that it is imposing an additional standard in claiming compensation for the use of a 'special power' over and above the requirements for succeeding in such actions already existing at law.

Arguably the provision might be read to create a new type of action for compensation where a person suffers loss as a result of the exercise of the 'special powers' – if a person could show loss, then they would be entitled to reasonable compensation if they can show that it is just that such an action be made in that case.

However, another construction of the section might be made by a court which would be detrimental to the plaintiff, especially when bringing an action for damages for the use of a special power under another area of the law; say, for example, an action in tort for personal injury. The court might read section 85(1) to mean that it does have the power to award damages in tort, but in light of section 85(3), only when it is just in the circumstances of the particular case. A requirement that it is just in the circumstances might deny a plaintiff compensation they might have otherwise received. For example, if in a tort action for personal injury the plaintiff might be seeking to rely on the "egg-shell principle"[9] this requirement might negate compensation ordered on that basis as it might be argued to be unreasonable.

It is submitted that any potential ambiguity or problems this section might create could be ameliorated by adding an additional subclause to the effect that this section does not operate to limit rights otherwise available at law.

[9] See *Kavanagh v Akhtar* (1998) 45 NSWLR 588 for an example of this principle.

Furthermore, given the extreme intrusiveness that these powers entail, and the extreme distress that might accompany the exercise of these powers, even if exercised reasonably, we suggest that where the police damage something, compensation should be awarded on a strict liability basis. Invariably, property of innocent people might be damaged in the exercise of these 'special powers' – doors might be smashed in, electronic devices such as computers might be dismantled etc. There should be no need for tests of 'reasonableness' etc. If it is in the public interest that such damage be done, then the public purse should pay for it. An obvious exception is where the damage is done to the property of a person convicted of the offence in relation to which the damage was done.