

The Hon Anthony Whealy QC
Chair
COAG Review of Counter-Terrorism Legislation
via: CTReviewSubmissions@ag.gov.au

Dear Chair and Committee

Civil Liberties Australia (CLA) thanks the Australian Government and your committee for the opportunity to make comment to assist the review process. Knowing the quality of professional and academic legal comment you will receive (some of it from our members in their other capacities), we will largely confine our comments to matters of philosophy and “lay” considerations.

CLA is a non-profit group which works to protect people’s freedoms. Relevant to this submission, in particular we contribute at the drafting stage of bills to prevent excesses becoming law in the first place. As we receive no funding apart from member contributions, we are independent of government. In the 2011 calendar year, we made 39 submissions to federal and state parliamentary committees, mostly federal and mostly on draft legislation (such work makes up about 20% of what we do). In relation to our comments on counter-terror (CT) laws, we began operating in December 2003, and have been active in the area of trying to improve CT laws for nine years.

The Review itself:

We congratulate the Chair and Members for their courage in committing to concluding the review within six months. We don’t believe it is possible to complete the required work in that time in a quality fashion.

CLA recommends that the Review, at its next meeting, seeks an extension of at least six months – but preferably a year or more.

The comment above relates to the Review as originally envisioned. We would like to make two proposals which would extend the period of review out to maybe two years. The further analysis we propose could be done by the COAG group, and/or by other groups.

After “9/11”¹ there was a panicked reaction to put in place laws, people and machinery/systems to counter a massive new threat. Over the next decade a wide range of new CT laws, giving vastly increased money, staff and powers to police and security agencies, created a culture and reality within the Australian Government and police/security agencies of massive expansion of authoritarian power. The outcome is a proliferation of police-based and allied agencies– Australian Crime Commission, CrimTrac, the National Criminal Intelligence Fusion Centre, Australian Transaction Reporting and Analysis Centre, numerous Working Groups, Coordination Committees,

¹ USA shorthand for the terrorist attacks, using aircraft, on the Twin Towers in New York, the Pentagon and a field in Pennsylvania on 11 September 2001.

etc. The result is reportedly chaos: there is a serious danger that Australia now sits at the same stage of confusion as occurred in the USA, where all the people and elements of the '9/11' plot were identified, but disparate operational and intelligence resources protected the terrorists and worked against the Administration.

CLA recommends:

At the same time as this current COAG Review of CT, that an equivalent review is undertaken – by the same Review team or another team – into all criminal and associated laws put in place since 9/11 that target Organised and Other Crime (OOC) and the like, and that involve intelligence, data, financial and movement transactions.

Returning to the Review of CT (and of OOC, for that matter): CLA comments that nobody – not ourselves, not the Review team – is in a position to evaluate properly the proportionality of the current laws. Unlike comparable countries (NZ, Canada, the UK, the USA, and the EU), we do not have a bill of rights as a benchmark against which to measure intrusions on the human rights and civil liberties of Australians. We nearly had one, in 2009, but the Labor Government reneged on what had been earlier manifesto commitments (the Coalition parties oppose such a bill).

In the absence of the normal measuring stick against which to compare the impact of laws - a bill of rights - CLA proposes that a Foundation Document (of Set of Principles) be assembled by the Human Rights Committee (HRC) of the Australian Parliament. The document would collate the rights and liberties obligations (and personal responsibilities) under the Constitution, the relevant conventions which Australia has ratified, the treaties we have agreed to, and the aspects of common law which are the guideposts for daily living. We have written to the HRC and asked it to undertake this work.

As well, for the past 11 years, the claim has been in Explanatory Memos that “this Bill strikes a balance between...”. However, in all cases, there has been a presupposition that a new Act was actually needed. CLA believes that there should be a preliminary step, to prove by research/analysis of real, live events, that a new piece of CT legislation is absolutely mandatory.

CLA recommends:

That this COAG Review postpones its evaluation of CT laws until such a measuring tool is in place, or that this COAG Review Committee – with the addition of human rights lawyers, and civil liberties and privacy people to it strength – undertakes such work.

The following comment relates to the third dot-point of the review: ...”exercised in a way that is evidence-based, intelligence-led and proportionate”. Again, we make the point that measuring what fraction of “proportionate” is met is not possible until there is a denominator, as outlined above.

We believe that the laws should be exercised in a way that is evidence-based. Period. There is a grave danger in “emergency” CT laws being exercised in a way that is solely “intelligence-led”. Intelligence can cover everything from raw data and base information to guesstimates, gossip and scuttlebutt. Currently, there is no review mechanism in place in any of the police or security agencies to review the accuracy and integrity of gathered intelligence, so far as CLA is aware. The various systems adequately vacuum in the dust of human existence, but there there is no

appropriate filtration system, or quality control. The very nature of “secret” “intelligence” databases militate against quality: the accuracy of intelligence will invariably be as patchy as the people lodging data, unless serious efforts are made to ensure the standard of quality is adequate so that the intelligence can be exercised in a way that is not injurious to innocent people.

CLA recommends:

That this Review Committee proposes one or more lay entities (that is, not comprising police/security/customs/ASIO/etc people) to monitor the “intelligence” holdings of selected agencies four times a year by random selection of files.

CLA would be happy to develop such a proposal further for the committee, if it desires.

The CT threat in Australian has not changed today from what it was the day before 9/11. Not even the Bali bombings changed the formal security threat. Given that is the reality, the CT laws – drawn up in haste and panic, and largely passed under “emergency” declarations of the Ruddock/Howard era before 2007 (for example, the “sedition” laws) are no longer needed. However, it may be prudent to wait another decade before doing away with them as a specific class of the law of the land.

CLA recommends:

In terms of “safeguards against abuse”, that *the COAG Review Committee advises that all CT-based laws should have sunset clauses of five (5) years. Ten (10) years from now, all “CT” laws should be absorbed into the criminal laws of Australia (that is, the Crimes Act).*

CLA further comments that the overwhelming culture that has been fostered by the CT laws is one of fear. We believe that Parliamentarians, police and security bodies suffer obsessively from the “not on my watch” syndrome, and therefore over-compensate by way of more draconian laws and disproportionate, excess allocation of people and funds to CT. CLA believes that the Australian people are much braver for themselves than are their politicians and their police/security services, and simply want to get on with their lives freed from the restrictions that CT laws have put in place, the invasions of privacy that CT laws have caused, and the culture of negativity and fear that over-emphasis on terrorism and counter-terrorism delivers.

We wish the COAG Review Committee well. There is an enormous industry of CT-based industry and entities that owe their continuing existence and future expansion to their ability to keep the fear level meter in the Australian community tending towards boiling point.

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