ADDITIONAL COMMENTS AND POINTS OF DISSENT

BY SENATOR NATASHA STOTT DESPOJA ON BEHALF OF THE AUSTRALIAN DEMOCRATS

1.1 The Democrats agree with a majority of the recommendations presented in the Chair's report.

1.2 We commend the Chair and the Secretariat for their efforts.

1.3 We believe that this Bill as introduced will erode key legal rights and undermine crucial civil liberties. It is a fundamentally flawed piece of legislation and the Democrats remain opposed to the Bill in its current form.

1.4 This Bill epitomises the Government's approach to power. The method in which it attempted to pass this legislation is an affront to democracy and belies its commitment to the Australian public to act in a responsible and representative manner.

1.5 The content of the Bill has been appropriately described as draconian and arguably represents a disproportionate response to the terrorist threat Australia is facing. A convincing argument as to the inadequacy of existing laws and the corresponding necessity for such expansive new laws was absent during the inquiry into this Bill.

1.6 The inadequacy of the Bill was highlighted in the inquiry process. The Democrats are pleased to have been responsible for moving successfully to extend the inquiry period to three weeks rather than a potential farcical, one day inquiry.

1.7 We believe a majority of the recommendations contained in the Chair's report will improve the Bill and lessen the potential for abuses of human rights but provide the following additions:

International Law

1.8 This Bill allows for potential breaches of international human rights law on a number of grounds.

1.9 We note the discussion of derogation from the ICCPR in the Chair's report and add that the Bill potentially threatens rights under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *Convention of the Rights of the Child.*

1.10 The Democrats note the discussion of the issue of prohibited contact orders in the Chair's report. However, we are deeply concerned by examples of the Government's denial of the implications of this legislation, as stated by representatives of the Government.

1.11 In a response to my question on notice about whether any measures were taken to ensure that this legislation met with international human rights obligations, the Attorney-General's Department made the following point:

> Preventative Detention is not incommunicado detention. Incommunicado detention involves complete isolation from the outside world such that not even the closest relatives know where the person is located.[1]

1.12 The Democrats note this statement with alarm. Section 105.40 provides that any "entitlement" a detainee has to make contact with relatives, the Ombudsman or their lawyer is subject to a prohibited contact order. This effectively removes any entitlement to contact, therefore allowing for a person to be held incommunicado for the duration of their detention.

1.13 During the inquiry, I asked a series of questions of the Public Interest Advocacy Centre (PIAC) on the relationship between the Bill and international human rights law.

1.14 In response to this questioning, Ms Stratton from the PIAC stated that the Bill in its current form has the potential to allow for human rights breaches.[2]

1.15 In order to "get a very clear perspective…on the issue of enshrining or making reference to the international laws and conventions" in the Bill, I posed the following questions:

> You have given us a list in your submission of rights and freedoms that are potentially affected or could be breached as a consequence of this legislation. What are you seeking to do? How do we ensure proportionality in this Bill?[3]

1.16 Ms Stratton responded by stating that "explicit acknowledgement" of international instruments in the Bill would be necessary for this purpose and raised a salient point:

> If the Government is confident that upon its advice there are no human rights problems then why not give the undertaking and give people the assurance that every other comparable jurisdiction have by virtue of an

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1 Attachment A, Attorney-General's Department, Responses to Questions Placed on Notice by Senators during the *Senate Legal and Constitutional Committee Inquiry into the provisions of the Anti-Terrorism Bill (No. 2) 2005*, Monday, 14 November 2005, p. 2.

2 *Committee Hansard*, Monday 1 November 2005, p. 37.

3 *Committee Hansard*, Monday 1 November 2005, p. 37.

> independent constitutionally entrenched charter of rights? If we are not to have that, then why not give the assurance in the Bill?[4]

1.17 Similarly, the Human Rights and Equal Opportunity Commission (HREOC) "endorses the incorporation of international human rights norms into domestic law."[5]

1.18 The absence of a Bill of Rights in Australia places an obligation on the Government to incorporate consideration of protections for fundamental rights and freedoms.

Recommendation 1

1.19 That the *International Covenant on Civil and Political Rights*, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *Convention on the Rights of the Child* be incorporated in the Bill to allow for it to be regarded in relation to the Bill's operation.

Legal Professional Privilege

1.20 The restrictions on communication between a detainee and their lawyer under sections 105.37 and 105.38 of the Bill generate justifiably a sense of alarm, particularly from the legal community.

1.21 The Democrats believe that this Bill abandons a fundamental legal principle that provides the foundation for legal professional privilege.

1.22 Attempts to abrogate the relationship of trust and confidentiality between a detainee and their lawyer is gravely concerning.

1.23 A relationship of this kind is essential to the duty held by a legal representative to their client and allows for the client to be fully and fairly represented, in accordance with their well established democratic right.

1.24 The Castan Centre for Human Rights described the treatment of lawyers in the Bill as "potential co-conspirators".[6]

1.25 The Democrats oppose any monitoring of communication between detainees and their legal representatives.

1.26 As the Law Council said in its submission:

> The monitoring of contact with a lawyer is repugnant and unnecessary and should be removed.[7]

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4 *Committee Hansard*, Monday 1 November 2005, p. 37.

5 *Submission 158,* p. 4.

6 *Submission 114*, p, 17.

7 *Submission 140*, p, 4.

1.27 Amnesty International pointed out that:

> Under international human rights law, communications between an accused and their counsel are and must be confidential.[8]

1.28 While the Democrats appreciate there is a distinction in that a person subject to a preventative detention or control order is not necessarily "accused" of a crime, we argue that the absence of criminal charges creates an even stronger argument for the protection of their human rights.

1.29 As the Castan Centre for Human Rights rightly asserts, whether a person is accused of a crime or not:

> The right to communicate in confidence with one's lawyer is paramount.[9]

Recommendation 2

1.30 That all provisions placing restrictions on and requiring monitoring of communication between detainees and their legal representatives be removed from the Bill.

The Treatment of Children Aged 16 to 18

1.31 The Democrats raised a number of issues in relation to the treatment of children aged 16 to 18. We support the recommendations of the Committee that minors be separated from adults in detention.

1.32 The idea that the Government is attempting to legislate so that children as young as 16 may be subject to preventative detention and control orders, measures already of extreme concern in relation to their application to adults, is inexcusable.

1.33 Firstly, the Democrats oppose the application of the Bill to children aged 16 to 18. There are possibilities for breaches of the *Convention on the Rights of the Child* (*CRC*) under this Bill. Most notably Article 37, which provides that States Parties shall ensure that:

> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
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> (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

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8 *Submission 141*, p, 27.

9 *Submission 114*, p16.

> (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

1.34 In addition, Amnesty International has asserted that the control order provisions in the Bill potentially breach Article 40 of the *CRC*. Article 40 provides that a child is presumed innocent until proven guilty yet, the operation of control orders imposes a penalty without charge or the opportunity to answer a charge.[10]

1.35 Protection against threats to these rights could be guarded against by enshrining the Convention in the Bill as recommended above.

1.36 The Democrats note and support the comments of the Northern Beaches Civil Rights Forum in relation to child advocates. Child advocates should be provided for children subject to preventative detention orders and control orders; and for those affected by proximity to other individuals subject to such orders.

> The Forum urges the Senate to ensure that all state and federal agencies dealing with counter-terrorism be required to have a protocol for protecting children caught in operational matters. This should take the form of an independent child protection officer who attends all raids. While it will not lessen the fear or trauma suffered by children caught in such actions, it will provide a greater guarantee that the best interest of the child is served and that excesses are curbed.
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> Experience over many years with Immigration Department Compliance raids has amply demonstrated the damage that can be caused to children placed in such traumatising situations. To be invaded in the "safe" environment of home – or worse - woken from sleep by strangers in dark uniforms with weapons and strong lights displaying shouting, aggressive attitude is, literally, a child's worst nightmare.[11]

Recommendation 3

1.37 The training and appointment of an independent child welfare and advocacy officer to oversee the health and welfare of children in preventative detention and children subject to control orders.

Mental Health of Detainees

1.38 The Democrats also have concerns in relation to detainees with mental health issues.

1.39 The Democrats note the evidence of Mr Von Doussa for HREOC who stated:

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10 *Submission 141*, p. 23.

11 *Submission 191*, p. 7.

> If a person has a mental illness of some sort, being cut off from their support mechanisms, and particularly being confined…could be disastrous for that person. It is not clear in the legislation what access there would be to mental health support…Those issues could be dealt with in a protocol, but at the moment the legislation is silent about that.[12]

1.40 The issue of introducing a protocol for the treatment of those subject to preventative detention and control orders was suggested by HREOC.

1.41 HREOC's proposal was to create a protocol similar to that which exists under the *ASIO Act 1979* in relation to the way people are detained under that act. Additionally, Mr Von Doussa referred to the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, developed by the United Nations Office of the High Commissioner for Human Rights, which he suggested could also be useful as a guide.[13]

Recommendation 4

1.42 That a protocol be established for the treatment of people subject to control and preventative detention orders.

Authorisation of Orders

1.43 It is of concern to the Democrats that senior AFP members are granted the authority under this legislation to place people under initial preventative detention or control orders. The Democrats do not believe that this is appropriate or necessary.

1.44 The Public Interest Advocacy Centre remarks that:

> An issuing court is asked to sit as secondary decision-maker rather than as a court. The more appropriate arrangement would be for the court to be required to make the determination as to whether a control order is necessary in all circumstances, rather than approving or varying a decision made by the AFP with the Attorney-General.[14]

1.45 Australian Lawyers for Human Rights state in their submission to the inquiry:

> The use of an executive warrant (rather than a judicial warrant) may be characterised as disproportionate to the aim of detaining a person and in that way is characterised in human rights jurisprudence as "arbitrary" even though it is prima facie authorised at law. Accordingly, the executive warrant proves breaches Article 9(1) of the *ICCPR*.[15]

1.46 The Democrats are also concerned about the ability of judicial officers and some non-judicial tribunal members to confirm preventative detention orders. The

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12 *Committee Hansard*, Thursday 17 November, p. 48.

13 Adopted by General Assembly resolution 43/173 of 9 December 1988

14 *Submission 142*, p. 32.

15 *Submission 139*, p. 16.

Democrats believe that this function would be more appropriately discharged by a Federal Court or State Supreme Court judge with knowledge and understanding of matters akin to criminal law.[16]

Recommendation 5

1.47 That preventative detention and control orders should be issued by a Federal Court or a State Supreme Court. If this recommendation is not adopted we recommend that, following the issue of an initial order by the AFP, such a court will review the issue of the order in all the circumstances.

Access to Judicial Review

1.48 The Democrats strongly oppose the denial of access to full judicial review for those subject to preventative detention orders. Coupled with the lack of transparency inherent in the process of making such orders, this seriously jeopardises the opportunity for people to satisfactorily challenge an order made against them.

1.49 This is an essential safeguard as the Law Council identifies:

> The extraordinary measures found in this Bill will confer great and unusual powers on the executive.[17]

Recommendation 6

1.50 The Democrats recommend that full access to applications for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* be provided to those subject to both preventative detention and control orders.

Impact on Privacy

1.51 The Democrats have strong concerns in relation to the impact of the legislation on privacy and do not believe that the Federal Privacy Commissioner's suggestions have been acknowledged by the Government.

1.52 The Democrats believe all legislation affecting the privacy of Australians should require the Government to seek advice from the Office of the Federal Privacy Commissioner prior to its introduction.

1.53 I sought to ascertain during the inquiry whether such advice had been given and whether the Commissioner was satisfied with the Bill. The Attorney-General's Department was ambiguous on this but the Commissioner's submission makes her concern in relation to the Bill clear.

16 *Submission 140*, p. 11.

17 *Submission 140*, p. 10.

1.54 The Democrats note with concern the many and varied dimensions of privacy that this Bill will affect. These include: bodily privacy, territorial privacy, communications privacy, freedom from surveillance and information privacy.[18]

1.55 For example, section 104.5(3) provides that, in addition to being subject to the obligations, prohibitions or restrictions, of a control order, an individual may be photographed and fingerprinted. This can all occur without charges being laid.

1.56 One of the most intrusive aspects of the control order provisions, section 104.5(3)(d), requires a person subject to an order to wear a tracking device at all times. This is a disproportionate requirement of a person who has not been charged.

1.57 In relation to Schedule 8 of the proposed legislation on optical surveillance, the Office of the Federal Privacy Commissioner stated:

> …such technology allows for the routine and indiscriminate surveillance of large numbers of people, for example, in public spaces in airport arrival halls.[19]

1.58 According to the Office of the Victorian Privacy Commissioner:

> Privacy will be adversely affected by the Bill's provisions for control orders, preventative detention, powers to stop question and search, surveillance, warrantless information demands, and compulsory reporting of financial transactions. Each will affect, to varying degrees, the privacy of individuals in relation to whom the provisions are exercised. In many instances, there will also be adverse effects on the privacy of persons who are related to or associated with those individuals.[20]

1.59 It must be ensured that the personal information collected by CCTV is consistent with the principles of the Privacy Act, according to the Commissioner. This could be ensured through an amendment to section 74K(2) of the *Aviation Transport Security Act 2004,* as suggested by the Privacy Commissioner.

1.60 We have seen a steady erosion of privacy rights in Australia in recent years. While recognising that privacy is not an absolute right, and privacy protection requires a balance with other considerations, the Democrats believe the balance has been tipped in favour of privacy intrusion.

1.61 The combination of an expansion in the powers of law enforcement and intelligence agencies facilitated by these laws, and laws such as the *Telecommunications (Interception) Act 1979,* will have a further dramatic cumulative corrosive effect on privacy for Australians.

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18 *Submission 276*, p. 1.

19 *Submission 276*, p. 9.

20 *Submission 276*, p. 1.

1.62 We strongly support additional resources for the currently under-resourced Office of the Federal Privacy Commissioner to ensure that proposed laws dealing with law enforcement and security powers are properly scrutinised by the Commissioner.

1.63 We note the discussion contained in the Chair's report of the doubling of the size of ASIO over the next 5 years and would welcome a corresponding increase for the Commissioner. This contrast in priorities is another clear example of the Government's seeming lack of regard for the basic privacy protection of Australians.

Recommendation 7

1.64 That section 74K(2) be amended as the Privacy Commissioner has suggested to ensure the protection of personal information obtained through the use of CCTV.

Recommendation 8

1.65 That the resources of the Office of the Federal Privacy Commissioner be increased.

Recommendation 9

1.66 That the laws be analysed by the Federal Privacy Commissioner for their impact on the privacy of Australians and this report (including recommendations) be tabled in Federal Parliament.

Absence of a Bill of Rights

1.67 This Bill's dramatic implications for human rights and civil liberties are even more concerning, given Australia does not have a Bill of Rights or Human Rights Act.

1.68 As the only common law country without such protection, the basic human rights of Australians are subject to greater risk than the rights of citizens of these other nations.

1.69 While a number of the provisions contained in this Bill emulate the United Kingdom's laws, it does not contain the UK's accompanying protections for human rights and civil liberties.

1.70 The *Human Rights Act* and the *European Convention on Human Rights* provide citizens of the United Kingdom with an avenue of appeal and an opportunity for judicial review when their Government infringes on these rights.

1.71 The absence of a Bill of Rights or Human Rights Act exposes needlessly Australians to unjust infringements on their rights and freedoms.

1.72 Currently, provided that the Parliament makes its intention clear, it can pass legislation violating almost any human right, with the exception of the few express rights which are protected by the Constitution including the right to trial by jury and freedom of religion. However, even these express rights are limited, for instance, trial

by jury applies only where the Commonwealth has determined that a trial is to be "on indictment". In other words, it operates at the discretion of the Commonwealth.

1.73 A Bill of Rights is about protecting people and ensuring that our Government remains accountable for its actions.

1.74 Bills of Rights generally cover rights such as freedom of religion; freedom of peaceful assembly; freedom of association; the right to vote; the right to a fair trial; the right to life, liberty and security of the person; the right not to be arbitrarily detained; the right not to be subjected to cruel and unusual treatment; equality before the law; and, the right not to be discriminated against.

1.75 For example, the New Zealand *Bill of Rights Act* covers a range of civil and political rights. The United Kingdom's *Human Rights Act 1998* incorporates rights set out in the European Convention on Human Rights including the rights to property, education and free elections, and the abolition of the death penalty. Canada's *Charter of Human Rights and Freedoms* includes the right to affirmative action and cultural rights. The *South African Bill of Rights* is striking for its broad coverage of rights. It includes economic and social rights such as access to housing, health care, food, water and security, and rights such as that to a healthy environment and also property rights.

1.76 The Democrats' *Parliamentary Charter of Rights and Freedoms Bill* is on the Senate Notice Paper and the Democrats will continue to advocate for an Australian Charter of Rights and Freedoms.

Recommendation 10

1.77 That Parliament enact a *Parliamentary Charter of Rights and Freedoms Bill* to provide Australians with basic protections against which legislation that potential infringes on human rights and civil liberties may be moderated.

Sunset Clauses

1.78 In relation to the inclusion of a sunset clause in the Bill, the Democrats believe that the current proposal of ten years is grossly inadequate. We note the recommendation of a five year sunset clause in the Chair's report and agree that the period during which the sunset clause is in place must be reduced.

1.79 We are not convinced by the Attorney-General's Department's response to the inquiry that a ten year period is necessary. It was suggested that this was due to the "thought that it will be used very rarely".[21]

21 Mr Geoff MacDonald, Attorney-General's Department, *Committee Hansard*, Monday 1 November 2005, Senate Legal and Constitutional Committee Inquiry into the Anti-Terrorism Bill (No. 2) 2005, p. 15.

1.80 The Democrats believe that to allow for the operation of such extensive and invasive powers for such a long period of time on the contingency that they may be used rarely is dangerous and unwise.

1.81 A reduction in the length of the sunset clause for this legislation is widely supported. In its submission to the inquiry, HREOC suggested that a more appropriate expiration for the legislation would be four to five years.[22]

1.82 The Gilbert and Tobin Centre for Public Law suggested a sunset clause of three years should be enacted due to the "uncertainty and speculation involved" in predictions of the nature and extent of the terrorist threat Australia will continue to face.[23]

1.83 A three year sunset clause would be reasonable and appropriate given the operation and impact of legislation.

Recommendation 11

1.84 The Democrats believe a that the Bill be amended to include a sunset clause of 3 years.

Sedition

1.85 The Democrats are strongly opposed to the sedition provisions contained in this legislation. We have argued against their inclusion and believe they should be removed from the Bill.

1.86 The Democrats note that the substantial discussion of the issues relating to the proposed sedition laws in the Chair's report and agree with the evidence provided therein.

1.87 There is a strong argument in favour of repealing the existing laws relating to sedition which have been characterised as "dead letter law" and have no place in contemporary democratic and free societies.

1.88 In evidence provided to the Committee, Mr Chris Connolly for the Arts and Creative Industries of Australia submitted:

> It is almost without exception that modern democracies have repealed sedition laws or recognised them as obsolete.[24]

1.89 At a minimum, we support the Chair's recommendation that Schedule 7 be removed entirely from this legislation pending review.

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22 *Submission 158*, p. 25.

23 *Submission 80*, p. 24.

24 *Committee Hansard*, Thursday, 17 November p. 4 – see the Chair's Report pp 69-125 for discussion.

Conclusion

1.90 The Democrats do not believe that sufficient justification has been provided for the extended and unprecedented powers it is seeking under this legislation.

1.91 In the absence of evidence supporting this Bill as a proportionate response to terrorism, the Democrats consider that the current powers of ASIO and the AFP are adequate.

1.92 This Bill should not be passed without a balance being struck between the security imperative and the need to preserve civil liberties and safeguard human rights. This Bill should be rejected.

Senator Natasha Stott Despoja

Australian Democrats