

Committee Secretary  
Senate Legal and Constitutional Committee  
Department of the Senate  
Parliament House  
Canberra, ACT 2600

Dear Secretary,

**Submission in relation to the Anti-Terrorism Bill 2005 (Cth)**

The Centre for Human Rights Education at Curtin University, Perth, Western Australia was established in 2003. The Centre aims to foster debate, research and scholarship about human rights, and to promote human rights awareness and debate about human rights issues in the wider community. It is multi-disciplinary and committed to linking human rights theory, human rights education and human rights practice. It is also committed to genuine dialogue across different cultural and religious traditions about the meaning and implementation of human rights.

The Centre for Human Rights Education has serious concerns about the proposed Anti-Terrorism Bill ('the Bill') notably its potential impact on:

- the human rights of all Australians and of Australians from minority groups in particular;
- education, and:
- important democratic dissent and protest.

Many of the measures proposed in the Bill pose a serious threat to the democratic freedoms which the government purports to be protecting; will seriously erode human rights protections and are unlikely to improve the security of Australians from terrorism.

The Centre is concerned about the short time frame for meaningful debate and scrutiny of the proposed changes. The Bill itself has not been made widely available by the Federal government, though we are pleased to note it is now on the Senate web page. Australian citizens and civil society institutions have had an extremely short timeframe to examine the legislation and make written submissions, the Senate Committee also faces a worryingly short period of time to examine those submissions and properly consider the issues they raise. The Bill provides exceptional powers for police and security organisations and should be carefully explored and discussed before introducing such fundamental changes to cornerstone principles of a liberal

democratic society. ‘Rushing’ the Bill through effectively prevents an important public dialogue and does little to engender faith in the democratic process.

### **A Human Rights Perspective**

In our view, the proposed laws breach a number of human rights principles, in particular several articles of the International Covenant on Civil and Political Rights (ICCPR) to which Australia is a signatory. The Bill contains no reference to human rights standards nor to Australia’s human rights obligations under international human rights law. The Prime Minister and the Attorney General have assured the Australian public that the Bill is consistent with human rights laws and principles, however, the Bill does not reaffirm the importance of human rights either in a statement of principles or codified procedurally within schedules of the Bill itself.

#### *Established legal processes and principles.*

Several procedural issues within the Bill run counter to established fundamental legal principles designed to ensure fairness within Australia’s legal system. Points of concern include:

- Shifting of the burden of proof from the prosecution to the defence;
- *Ex parte* hearings for both control orders and preventative detention orders;
- Paucity of information provided to people subject to preventative detention and control orders;
- Insufficient separation of powers between the executive and the judiciary;
- Insufficient access to the courts;
- Insufficient judicial oversight, and;
- Restrictions on access to legally privileged independent legal advice.

Persons subject to either preventative detention orders or control orders have a right only to be provided with a copy of the order itself. The suspected person’s right to be informed of the reasons for the order or the evidence upon which it was based is not protected within this Bill. At the same time, the burden is on the affected individual to apply for and make the case for a control order to be revoked. Given that the hearing granting the control order will be held without that person present and that he/she has no protected right to the information presented at that hearing, this provision (to apply for an order to be revoked) does not satisfy international standards for access to the courts and may, in the expert opinion of Professors Byrnes and Charlesworth and Ms. Gabrielle McKinnon,<sup>1</sup> fall sufficiently short of such standards as to constitute a violation of the right to freedom from arbitrary arrest or detention as provided for in Article 9 of the ICCPR.

Furthermore, initial preventative detention orders require that an Australian Federal Police (AFP) member apply to a senior AFP member (rank of Superintendent or above) for a preventative detention order. Detaining a person is an extremely serious step to take and the Criminal Code contains rigorous safeguards in relation to arrest

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<sup>1</sup> *Human Rights Implications for the Anti-Terrorism Bill 2005*, advice provided to ACT Chief Minister Jon Stanhope by Professor Andrew Byrnes (International Law, University of New South Wales), Professor Hilary Charlesworth (International Law and Human Rights, Australian National University) and Gabrielle McKinnon (Regulatory Institutions Network, Australian National University) available online [http://www.chiefminister.act.gov.au/docs/Stanhope\\_advice\\_20051018.pdf](http://www.chiefminister.act.gov.au/docs/Stanhope_advice_20051018.pdf)

and imprisonment of suspects. In this Bill the AFP is both applicant and issuing authority of initial preventative detention orders, this has a huge potential for abuse and we regard this as failing to provide adequate safeguards for those detained.

Continuing preventative detention orders are sought again by the AFP and issued by a ministerially appointed Federal Court Magistrate or Judge. The Magistrate or Judge will, however, be acting in her/his *personal* capacity, not as a court. The clear separation of executive and judicial powers is compromised by this provision. Furthermore, the Australian government has failed to demonstrate any need for the courts to be bypassed in this process and there is no information provided to support the assertion that these measures in some way improve Australia's national security.

In our opinion, the proposed preventative detention orders breach several important human rights principles most notably Articles 9 and 14 of the ICCPR which provide:

*Article 9*

(1) Everyone has the right to liberty and security of person. **No one shall be subjected to arbitrary arrest or detention.** No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

(4) **Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.**

*Article 14*

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, **everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.** The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. **Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.**

3. **In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:**

(a) **To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;**

(b) **To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;**

(c) To be tried without undue delay;

(d) **To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing;** to be informed, if he does

not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;  
ICCPR<sup>2</sup> [**Our emphasis**]

### **A Human Rights Education Perspective**

The Centre for Human Rights Education offers two Masters degree courses in human rights and hosts public seminars and workshops that address a range of domestic and international human rights issues. The Centre also produces journal articles, conference papers and other forms of publicly available documents seeking to raise critical awareness of human rights related issues.

Whilst the Centre educates about structures of the United Nations, treaties, conventions and the like, it is difficult to imagine how one could engage in meaningful education at a Masters level without critically discussing Australia's compliance or otherwise with international human rights obligations and standards. There are a number of contemporary human rights issues for example the mandatory detention of unauthorised arrivals (including asylum seekers), (past and present) Federal and State government policies affecting Indigenous Australians, proposed industrial relations changes, and measures to combat alleged terrorist activities. Critical education requires freedom of information, thought and expression only with restrictions that are absolutely necessary to protect the same freedoms for fellow human beings.

Could, for example, a lecture which addressed the tensions between the United Nations and Australia in recent years regarding mandatory detention, and made a clear stand that the practice breaches ICCPR Article 9 (arbitrary detention) supported by the reported findings of the United Nations Working Group on Arbitrary Detention,<sup>3</sup> be considered to be 'urging disaffection' with the Federal government?

What if the Centre held a public seminar exploring the situation in Iraq with speakers who analyse the insurgency from a range of perspectives including those who see the insurgency as terrorist actions and those who see the insurgents as defenders of their country against an unlawful invading force? Perhaps one possible speaker would be an Australian who had travelled to Iraq as a 'human shield' thereby frustrating coalition forces' operations in the country – an act which could be viewed as seditious under the Bill. Would the Centre be further engaging in a seditious act if the proceeds from the seminar were donated to the human shield organisation or to an Iraqi NGO medical group that provided care to whoever needed it regardless of their position in the conflict?

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<sup>2</sup>International Covenant on Civil and Political Rights (1966) available online United Nations Office of the High Commissioner of Human Rights [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm)

<sup>3</sup> United Nations Office of the High Commissioner for Human Rights Working Group on Arbitrary Detention, Country visits, Australia document number [E/CN.4/2003/8/Add.2](http://daccessdds.un.org/doc/UNDOC/GEN/G02/153/91/PDF/G0215391.pdf?OpenElement) accessible: <http://daccessdds.un.org/doc/UNDOC/GEN/G02/153/91/PDF/G0215391.pdf?OpenElement>

The laws contained in the Bill are vaguely drafted. The Prime Minister has spoken to Australian media services reassuring Australians that the laws are not aimed at stifling good faith political discussion and protest. The Bill however does not protect such discussion and protest, casting the burden of proof on the defendant.

Sedition is an archaic concept and one which is particularly problematic when invoked in the so-called 'war on terror' when both the 'enemy' and a 'terrorist act' are poorly defined. The Centre believes that re-invigorating such laws does more to undermine Australia's way of life and dearly held freedoms than the terror threat warrants, and indeed more than the terror threat itself brings.

### **An Australian Bill of Rights**

Many of the laws included in the Bill draw heavily on legislation in the UK and the US. Whilst Australia ought to be seeking to learn from and share ideas with other countries, it is inappropriate to import laws from other contexts. Unlike the US and the UK, Australia does not have a Bill of Rights or a Human Rights Act. The Australian Constitution provides only limited protections to balance such exceptional powers. The UK legislation for example, has much stronger judicial oversight protected by the UK Human Rights Act 1998.

The Centre takes this opportunity to remind the Senate of the important and increasingly compelling need for an Australian Bill of Rights to help ensure that human rights norms and standards are not 'trumped' by national security in the war on terror.

### **Lack of demonstrated necessity**

Human Rights laws (such as the ICCPR) do provide for exceptional powers in exceptional circumstances including the placing of temporary restrictions on otherwise protected freedoms. The onus is on the State to demonstrate that such measures are essential to the security and well-being of the country, its people and institutions. The Australian government has failed to make any such argument, it has made repeated but imprecise references to the terror threat without clearly enunciating what that threat is or how these laws will assist in ameliorating that threat. There are a few important points to note here. The first is that terrorism and violence are already illegal in Australia under the Criminal Code and it is unclear how these additional measures will strengthen the power of police or security organisations to properly respond to such actions or threats. The Australian government has maintained its terror threat assessment as 'medium' since the September 11 2001 attacks in the US. The threat level has remained unchanged despite a series of attacks against Australian interests in Indonesia. Without a corresponding raising of the threat level, it is difficult to see the justification for eroding fundamental rights and freedoms. It is notable that, the UK already had many of the powers contained in this Bill prior to the July 7 2005 bombings in London. The presence of such legislation did not assist UK authorities in preventing the attacks.

The Centre does not believe that this Bill will make Australia any safer.

## Conclusion

In conclusion the Centre for Human Rights Education believes that this Bill should not be passed either as it stands or with amendments. The Centre believes that the Bill is fundamentally flawed and presents a serious threat to liberty, justice and democracy. The powers granted by the Bill will not increase Australia's safety and do not contain sufficient protections against misuse. In the current socio-political environment the Bill may disproportionately impact on Australians of Middle Eastern origin or of the Muslim faith, stifle freedom of speech (which will be absolutely essential in understanding, addressing and combating the root causes of international terrorism), impact on proper democratic protest and create a problematic environment for critical education such as that in which the Centre specialises.

Yours sincerely,

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Submission prepared drawing on material from the Anti-Terrorism Bill 2005 (Cth); *Human Rights Implications for the Anti-Terrorism Bill 2005*, advice provided to ACT Chief Minister Jon Stanhope by Professor Andrew Byrnes (International Law, University of New South Wales), Professor Hilary Charlesworth (International Law and Human Rights, Australian National University) and Gabrielle McKinnon (Regulatory Institutions Network, Australian National University) available online [http://www.chiefminister.act.gov.au/docs/Stanhope\\_advice\\_20051018.pdf](http://www.chiefminister.act.gov.au/docs/Stanhope_advice_20051018.pdf); *Terrifying Democracy: An Overview of the Anti-Terrorism Bill 2005 and Existing Legislation* by Mark Cox, 7 November 2005, and; *Briefing on Proposed Australian Counter-Terrorism Laws* by Ban Saul, 15 September 2005.