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

Dear Secretary ,

Submission on the Commonwealth *Anti-Terrorism Bill (No. 2) 2005*

I welcome the opportunity to make a submission to this Senate inquiry. Our submission considers solely the issue of whether the Bill complies with Australia's human rights obligations in particular regarding control orders, preventive detention and the newly defined offence of sedition. These provisions are measured against the rights in the International Covenant on Civil and Political Rights ('ICCPR') to which Australia is a party – indeed the Bill should make explicit reference to these obligations. I welcome the improvements on the previous draft Bill in this Bill presented to Parliament, in particular, the enhanced fair trial rights for those subject to control orders and preventative detention. This Bill starkly reveals the urgent need for a national Bill of Rights, given the inadequate protections contained in the Constitution to implement our wide international human rights treaty obligations.

The Bill, as currently drafted, still contravenes the ICCPR in a number of significant ways, particularly in regard to the rights to liberty, fair trial, and free speech. It will also substantially restrict an individual's freedom of movement, freedom of association and privacy. In all instances the central question is whether the means suggested are strictly proportionate to the legitimate objective of protecting the Australian community from the risk of terrorism. National security issues are relevant to any enquiry of proportionality as to whether or not the objectives of the government could be achieved by less restrictive means. The existence of wide powers under Division 1 of the *Criminal Code,* the *Terrorism Act (no.1) 2005*, the *Australian Security Intelligence Organisation Act 1979* and other existing laws throws this issue of the necessary degree of protection from terrorism into question.

As Human Rights and Discrimination Commissioner I previously provided advice on the draft Anti-Terrorism Bill to the ACT Chief Minister, Jon Stanhope in my functions under section 41 of the ACT *Human Rights Act 2004* (HRA*)*. That advice considered the question whether provisions of the Bill, if enacted in the ACT, would be compatible with the ACT HRA, which is based on many provisions in the ICCPR. This advice is available on the Human Rights Office website at http://www.hro.act.gov.au under 'News and Events'.

The contact person for this submission is Dr Rowena Daw, Human Rights Legal Advisor.

Yours sincerely,
Dr Helen Watchirs

ACT Human Rights and Discrimination Commissioner
11 November 2005

ACT HUMAN RIGHTS OFFICE: SUBMISSION ON ANTI-TERRORISM BILL (NO. 2) 2005

Summary

The submission consists of 4 sections;

1.General implications of the antiterrorism legislation

2. Preventative detention

3. Control orders

4. The new sedition offences

1. In summary we believe that the case for such extreme measures that infringe human rights has not yet been made. The application of the Bill to young people and its potential impact on the Muslim community needs to be further considered.

2. The Bill allowing for preventative detention without charge, with limited access to a lawyer and circumscribed judicial review is contrary to the right to liberty in article 9 of the ICCPR

3. The Bill does not provide sufficient procedural safeguards for control orders to satisfy the right to a fair hearing under article 14 ICCPR nor, if they amount to house arrest, the right to liberty under article 9. the order will be almost impossible to challenge because of restrictions on evidence, short notice period and the difficulty in accessing the full information on which they are founded. There is no time limit on ex parte orders and no restriction on the numbers of control orders that can be successively imposed. The severe penalty of 5 years is disproportionate.

4. The sedition offences are too great an infringement of the right to freedom of expression under article 19 ICCPR to be proportionate to the objectives of the law. They should be abandoned. A careful and thorough examination of the existing law should be undertaken, with extensive consultation, before changes are made.

1. General implications of anti terrorism legislation

1. Terrorism is a matter of international concern and has been the subject of extensive debate in international and regional for dealing with human rights. There is therefore considerable guidance to assist the Australian Government in assessing the Bill against human rights standards. UN Security Council Resolution 1456 of 2003 clearly states that States Parties ‘must ensure that any measure taken to combat terrorism comply with all their obligations under

international law, and should adopt measures in accordance with international law, in particular international human rights, refugee, and humanitarian law'. The former UN High Commissioner for Human Rights, Mary Robinson, issued a statement setting out criteria for protecting human rights in the context of implementing anti-terrorism measures, and recommended that laws use precise criteria and not confer unfettered executive discretion. These principles require that restrictions be:

- prescribed by law (that is, they are not arbitrary in substance);
- necessary for public security or public order (there is a pressing social need);
- not impair the essence of the right;
- necessary in a democratic society (they are a product of consensus);
- in conformance with the principle of proportionality;[1]
- appropriate to achieve that aim;
- the least intrusive means to achieve the aim of the measures;
- respectful of the principle of non-discrimination; and
- not arbitrarily applied.[2]

2. The International Commission of Jurists (ICJ) have also produced Guidelines and Recommendations on anti-terrorism laws.[3] Article 3 of the ICJ's Berlin Declaration states that:

> 'States should avoid the abuse of counter-terrorism measures by ensuring that persons suspected of involvement in terrorist acts are only charged with crimes, which are strictly defined by law that are not retroactive, and in conformity with the principle of legality (*nullum crimen sine lege).*[4] States may not apply criminal law retroactively. They may not criminalise the lawful exercise of fundamental rights and freedoms. Criminal responsibility for acts of terrorism must be individual, not collective. In combating terrorism, states should apply, and where necessary adapt, existing criminal laws rather than create new, broadly defined offences or resort to extreme administrative measures, especially those involving deprivation of liberty.'

3. The Council of Europe's *Guidelines on Human Rights and the Fight Against Terrorism*, were adopted by the 45 Member States of Europe. These Guidelines were accepted by the UK

[1] There is a balance between the benefits expected from them on one hand, and on the other hand their adverse consequences for the individual concerned, as well as the free exercise in the right that is being restricted. See Appendix on section 28 of the *ACT Human Rights Act 2004.*
[2] UN Doc. E/CN.4/2002/18, Annex, 27 February 2002.
[3] Council of Europe, *Guidelines on Human Rights and the Fight Against Terrorism*, H (2002) 004.
[4] International Commission of Jurists, *The Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism, 28 August 2004.*

Joint Committee on Human Rights as the appropriate framework within which the debate about counter-terrorism measures should be conducted. The Guidelines specify that national counter-terrorism measures must operate within a human rights framework, including respect for the basic principles of a fair trial, be subject to proper judicial supervision, and must not use information or intelligence that is the product of torture.[5]

4. *Justification for restriction of rights*

Governments have a positive obligation under article 6(1) of the ICCPR to take measures necessary within their jurisdiction to protect individual lives against terrorist acts.[6] However, to justify laws which also infringe other human rights of those confined under them, the government needs to show that they are necessary to protect life. We are not satisfied that existing laws are inadequate to provide this protection against the current and actual level of risk, which according to the National Counter-Terrorism Alert Level has continued to be 'medium' since 11 September 2001.[7] This lack of change exists despite more recent terrorist acts overseas perpetrated against Australian citizens, and arrests and criminal charges within Australia this week. Both the preventative detention and control orders are based on the UK model, but these provisions were already in place when terrorist bombs were exploded in London in 2005 and do not appear to have been particularly effective. In practice the *Terrorism Act 2000* enabled 894 people to be arrested under a variety of provisions, but 496 were released without charge.[8] We understand that some of our existing laws have not yet been necessary to use, for example ASIO detaining people for up to seven days who are not terrorist suspects for the purpose of questioning.[9] Such questioning appears to have occurred without needing to detain people.

5. The new Bill does not apply to young people under the age of 16 years, and there are special provisions for young people between the ages of 16 to 18 years. This still may be contrary to the Convention on the Rights of the Child, which defines a child to be a person under the age of 18 years. In addition the Bill does not contain any provisions to satisfy the ICCPR detention requirements in Article 10(2)(a) that young people be separated from adults, and 10(2)(b) separating non-offenders from those who have been convicted of a criminal offence in prisons (under which Australia has a reservation).

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[5] See the Council of Europe's *Guidelines on Human Rights and the Fight Against Terrorism*, http://www.coe.int/T/E/Human_rights/h-inf(2002)8eng.pdf

[6] s.9 (1) of the ACT HR Act

[7] National Terrorism Committee Communique 8 July 2005: see http://www.nationalsecurity.gov.au/.

[8] These figures are for the period 11 September to 30 September 2005 - see UK Home Office website: http://www.homeoffice.gov.uk/security/terrorism-and-the-law/terrorism-act/

[9] John North, President of the Law Council of Australia in an interview on Lateline, ABC television, 17 October 2005.

6. We consider that the Bill's overly coercive measures will have a disproportionate impact on Australian Muslims,[10] who have the rights to equality and not to be discriminated against under articles 26 and 2(1) of the ICCPR, as well as protection as members of minority groups under article 27 of the ICCPR. The Bill will inevitably promote racial profiling and may contravene the *Racial Discrimination Act 1975, (Commonwealth)* and if mirrored in other jurisdictions, similar State and Territory laws (for example the *Discrimination Act 1991 ACT*) by directly or indirectly discriminating against minority populations. Alternative means of achieving protection from terrorism that will have less impact on racial equality should be considered. In addition many States have legislation prohibiting religious discrimination, as well as vilification.

7. The Australian government is not claiming to be at war or dealing with a public emergency that threatens the life of the nation or that circumstances may justify derogation under article 4 of the International Covenant on Civil and Political Rights from certain fundamental civil rights.[11] This absence of derogation affects the degree of comparison between the proposed federal legislation and the anti-terrorism legislation in the UK on which it is modelled. Only the UK has derogated from the right to liberty under article 9 of the ICCPR and article 5 of the European Convention of Human Rights.[12]

2.Preventative detention

8. Preventative detention without charge or trial is inherently problematic in respecting the human rights of individuals given the fundamental significance of the right to liberty in a democracy. It should only be used in the most exceptional circumstances and in strict accordance with the principles of international human rights law. General Comments of the Human Rights Committee, which monitors compliance with the ICCPR, have clarified that use of preventive detention for public security reasons must still comply with the right to liberty in article 9; it must not be arbitrary, it must be based on grounds and procedures established by law (that is, sufficiently circumscribed by law and specifically authorised), [13] information on the reasons must

[10] 'The Impact of Anti Terrorism Powers on the British Muslim population' Liberty, June 2004; Hillyard, *Suspect Community-People's Experience of the Prevention of Terrorism Acts in Britain* (1993). See also the Council for Racial Equality Submission to the Joint Committee on Human Rights, Review of Counter-terrorism Powers, 2003-4 HL 18th Report, Appendix 1.

[11] This may not be done on discriminatory grounds (eg race and religion) nor in respect of non-derogable rights, such as protection from torture and freedom of religion: UN Human Rights Committee, *General Comments Nos 28 and 24*, paras 8 and 10 respectively.

[12] UK Joint Committee on Human Rights, *18th Report*, Session 2003-04, para. 82. The UK House of Lords has held that the derogation in the *Anti- terrorism, Crime and Security Act* 2001 was invalid under the ECHR and it is not clear whether the amending legislation, *Prevention of Terrorism Act* 2005 has overcome that problem: *A v Sec of State for the Home Department* [2004] UKHL 56

[13] Discussed in Joseph, Schultz and Castan p. 308

be given, and court control of the detention must be available.[14] The common law does not generally sanction preventative detention.[15] One effect of these requirements is that the domestic law on which the detention is based must be 'accessible and precise' in order to enable the citizen to foresee the consequences that a given action may entail [16]. A detention will be 'arbitrary' if it is not in keeping with the purposes of article 9, or if it is disproportionate.

9. Under the Bill authorisation of preventive detention is through police applying to an 'issuing authority'. In the case of the initial order, the issuing authority under clause 101.1(1)(a) is the Australian Federal Police ('AFP') Commissioner, Deputy Commissioner or a member above the rank of Superintendent. In the case of continued orders, the issuing authority is a Federal Magistrate, Judge, retired judge or AAT member, who consents to the appointment under proposed clause 105.2. In our opinion all preventative detention orders should only be issued by independent judicial officers, in keeping with the general purpose of article 9.[17]

10 Article 9 ICCPR requires a person to be informed at the time of an 'arrest' of the reasons for the 'arrest'. An arrest may occur even if it is not on a criminal charge. It has been held, for instance, that an arrest is a "communication ..of an intention to hold the person concerned in the exercise of the authority to do so".[18] It is specifically stated in clause 105.19(2) that the police officer has the same powers as for an arrest for an 'offence'. The Bill however, in clause105.28, does not authorise reasons to be given when a person is taken into custody. The UN Human Rights Committee held Article 9 was violated in a situation where the detainee was only given information that the arrest was on security measures, without any indication of the substance of the case.[19]

11. Article 9(4) of the ICCPR requires that persons deprived of liberty by detention must have access to judicial review 'so that the court can decide, without delay, the lawfulness of the detention and order the person's release if the detention is not lawful'. This right includes full

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[14] UN Human Rights Committee, *General Comment No. 8*, para 4.
[15] : 'the 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 guilt.' As an exercise of judicial power 'citizens enjoy… at least in times of peace a constitutional immunity from being imprisoned… except pursuant to an order of the court in the exercise of the judicial power of the Commonwealth': *Chu Keong Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) per Brennan, Deane and Dawson JJ, 176 CLR 1 at pp.27-28.
[16] See for instance under the European Convention on Human Rights, *Sunday Times(No.1) v. &UK* 2 EHRR 245; *Steel and others v UK* (1999) 28 EHRR 603;
[17] Technically speaking the requirement under article 9(3) to be brought before a judge only applies to arrest on criminal charges.
[18] P[1996] 3NZLR 132 at 136
[19] *Drescher Caldas v Uruguay* , UN Doc Supp. No. 40 (A/38/40) p.192

access to a lawyer in order to test the lawfulness of detention. The cases *Berry v Jamaica* and *A v Australia* also clearly find that there is a right of access to a lawyer under Article 9(4).[20] The Human Rights Committee found a breach of Article 9(4) where a detainee was held incommunicado for three days without access to a lawyer.[21]

12. The new provisions in clause 105.51 provide for merits review by the Administrative Appeals Tribunal and judicial review in respect of a person's detention or treatment in detention by federal courts, but not while the order is in force. Judicial review is available under s.39B of the *Judiciary Act* – this includes injunctive relief, according to the Bill's Explanatory Memorandum. The *Administrative Decisions (Judicial Review) Act 1979* is expressly excluded (a typographical error in the Bill has the date 1997*)*. The review provisions in clause 105.52 will only apply to those orders which are then followed by orders under state or territory legislation, and only once the Commonwealth order is no longer in force.

13. The right to legal representation in the Bill is curtailed by clause 105.37 (1), which restricts the subject matter of legal representation to be in respect of a remedy from federal courts for preventive detention or humane treatment, making a complaint to the Ombudsman, or complaints to relevant State or Territory authorities. In practice there could be several charges and orders being made against the accused, such as control orders or the newly defined sedition offence. There appears to be no legitimate justification for this restriction, and therefore this limitation on subject matter is disproportionate.

14. In addition clause 105.37(3) prohibits contact with a lawyer who is included in a prohibited contact order, and the AFP is required to assist the detainee choose another lawyer, including recommending and giving priority to lawyers who have a security clearance. This gives rise to the public perception that only 'tame' rather than independent counsel will be allowed. All contact, including discussions with a lawyer is monitored under clause 105.38, contrary to UN rules about detainee's confidential access to lawyers,[22] and despite the express preservation of the law relating to legal professional privilege in clause 105.50.

[20] *Hammel v Madagascar* HRC, 330/88 and 560/93. The European Court of Human Rights also establishes that there is a right of access to a lawyer to enable effective application for release from detention: *Winterwerp v Netherlands* (1979) 2EHRR 387, para 66.
[21] HRC, 155/83.
[22] Rule 93 of the Standard Minimum Rules for the Treatment of Prisoners; and Principle 18 of the UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment.

15. However, as the detainee and his or her lawyer do not have full access to information regarding the basis for making the preventive detention order (only a summary is available), this may be an empty right of review if matters of national security are not revealed (similarly below, in relation to control orders). Clause 105.17 provides for revocation of a preventive detention order, but only upon application by the AFP.

16. Under the Bill a person is not held fully incommunicado, but is effectively so because of the very limited and monitored communication to family, work and friends to say that he or she is safe and cannot be contacted. That is, the person cannot state the reason for their absence without being liable to a disclosure offence under clause 105.41, with a penalty of 5 years imprisonment. Clause 105.38(2) also prohibits making this very restrictive contact until an interpreter is available for monitoring purposes. It may be argued that this limitation on communication may undermine the family as a natural and basic group unit of society, by not affording it protection as required by article 23(1) of the ICCPR. We expect that religious and community groups may also argue that marriages may be challenged by this limitation, in terms of people actually held in detention, as well as people who may imply that they are in detention for other purposes, eg concealing marital infidelity, or unapproved absences from educational institutions or work.

17. Under clause 105.28 a detainee is advised 'as soon as practicable' after being taken into custody of: the fact that a preventative detention order has been made; the period of detention and the fact that it may be continued; any applicable restrictions; the 'right' to complain to the Ombudsman and relevant State and Territory authorities; the 'entitlement' to contact a lawyer; and of the 'fact' that the person may seek a remedy from a federal court relating to the order or the person's treatment under it. This terminology substituting 'fact' for the 'right' of judicial review, and 'right' rather than a more appropriate term such as 'ability' to complain to the Ombudsman is unhelpful and should be amended. Under clause 105.32 the AFP is also required to give a copy of the order and a summary of the grounds (but not it if it prejudices national security) to the detainee 'as soon as practicable' after being taken into custody, and may request that a copy be sent to his or her lawyer (unless he or she is a prohibited contact). This provision should be amended to provide an automatic notification of the terms of the order to the person's nominated legal representative.

18. It is paradoxical for suspects to be detained without trial and with fewer rights to legal representation and communication, while persons properly charged with terrorism offences on the basis of stronger evidence have the full benefits of the right to a fair trial. The government

must show that the legitimate objective of protecting the community from danger is proportionate to the degree of harm could not be achieved by alternative means that involved less restriction on the right to liberty. The period of 14 days detention in the case of mirroring ACT or State legislation is too long and an alternative should be considered, such as lesser periods that may be renewed, but all of which at least are subject to full judicial review, as well as proper legal representation. For these reasons it is likely that the breach of the right to liberty under article 9 of the ICCPR would not be proportionate. We believe that this Bill allowing for preventative detention without charge, with limited access to a lawyer and circumscribed judicial review is contrary to the right to liberty in article 9 of the ICCPR

Control Orders

19 The Bill provides for twelve-month control orders. The threshold criteria are consideration by a court on reasonable grounds that it would either 'substantially assist in preventing a terrorist act' or that there is 'reasonable belief that the person has provided or received training from a listed terrorist organisation'. They appear to be modelled on control orders in the UK *Prevention of Terrorism Act* 2005. The UK government justified the use of more intense overt surveillance of individuals suspected of involvement in international terrorism because it was considered to be preferable on human rights grounds to detention. The Council of Europe's Commissioner for Human Rights notes with concern that:

> 'control orders are intended to substitute the ordinary criminal justice system with a parallel system run by the executive…What is essential is that the measures themselves are proportionate to the threat, objective in their criteria, respectful of all applicable rights and, on each individual application, justified on relevant, objective, and not purely racial or religious grounds.'[23]

20. The UK Act however is significantly different to this Bill. In particular it acknowledges the importance difference between orders involving house arrest ('derogating orders') and those that involve lesser restrictions on personal liberty ('non-derogating orders'). In order to avoid infringing the right to liberty (article 5 equivalent to ICCPR article 9) it provides extra safeguards for derogating orders. The UK Act has also been severely criticised on human rights grounds, most notably by the UK Parliamentary Joint Committee on Human Rights, for the control order's

[23] Council of Europe, Office of the Commissioner for Human Rights, *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom, 4-12 November 2004*, 8 June 2005, pp10-12

deficits in terms of human rights, including its failure to make these extra safeguards for non-derogating orders[24]. This issue is considered further below.

21 Under this Bill the initial orders are made ex parte as interim orders, on application by the AFP to a court. Clause 104.4 requires that the court 'is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act'. Clause 104.9 requires that the control order be served on the person subject to it, and that his or her lawyer may request a copy. It would appear that court orders may be obtained successively (cl.104.5 (2)). Breach of a control order is punishable by 5 years' imprisonment. This applies to both interim and confirmed orders. Particularly in the case of interim orders that are made ex parte such a heavy penalty is disproportionate.

22. The terms of control orders may include restrictions and prohibitions on a person's movements, activities, work, travel, communication (eg telephone and internet), association, possession or use of certain articles or substances, and requirements to report to specified persons and places, submit to counselling, home detention, and being photographed and fingerprinted, and use of electronic tracking devices. These restrictions are much more extensive than those available under current State and Territory legislation governing apprehended violence orders. They infringe human rights under the ICCPR by restricting travel (freedom of movement - article 12(1)) and by imposing tagging devices (privacy and reputation - article 17(1)). By limiting membership of groups or associations control orders can restrict both the right to association (article 22) and the right to freedom of religion (article 18).[25] They can also restrict access to information and limit internet use, which can be in breach of the right to freedom of expression (article 19 (2)). Control orders subjecting the person to house arrest also engage the right to liberty in article 9.

23 Ex parte orders substantially restrict a person's human rights as there is no right to be heard under article 14 of the ICCPR before interim orders are made, which themselves infringe human rights. One justification may be the danger that a person would abscond if he or she had notice of the intended order. However, that justification should apply on a case-by-case basis, rather than as a blanket provision. The impact of control orders may vary from a mere restriction

[24] Prevention of Terrorism Bill, 10th Report Session 2004-5.

25 In commenting on the tagging devices the UK Joint Committee on Human Rights stated: 'intense surveillance is ... a grave interference with the right to respect for private life, and should therefore only be used in cases where the only alternative would be detention. UK Joint Committee on Human Rights, *18th Report*, Session 2003-04, para. 74.

on communications to a full house arrest requiring a higher degree of justification. The UK *Prevention of Terrorism Act* 2005 also provides for both ex parte and defended hearings on control orders at a preliminary stage (but only for derogating orders). The UK Joint Committee commented:

> 'First, the fact that the application …is ex parte means that there will be no adversarial procedure before the making of a derogating control order. We accept that there should be the facility to make an ex parte application in an appropriate case, for example where there is a legitimate fear of disappearance or in other circumstances where the purpose of the application will be defeated if it is made on notice to the person concerned. In the absence of such concern, however, we see no reason why the hearing should not be inter partes at this preliminary stage, particularly if there is a power to detain the person concerned pending such an application (as there will be under the Government's own proposals and as in our view there already is under the current law'.[26]

24 There is no specific time limit for the interim order to come before the Court for an inter partes hearing and successive interim orders can be granted. There needs to be an express time limit on ex parte order so that the interim order will lapse if it is not confirmed within that time period. The degree of infringement of rights involved in these orders, together with the severe penalty of 5 years imprisonment for their breach supports the interpretation of these orders as being 'criminal' rather than 'civil' in nature for the purposes of human rights protection.[27] Therefore the protections afforded by the right to a fair hearing operate at a higher level necessary for criminal trials. In particular the 'presumption of innocence' under article 14 requires that the burden of proof of the 'offence' be on the government. If this is so, while it may not strictly be necessary that proof be beyond reasonable doubt, the case must at least be convincingly made out. The House of Lords has held that, in assessing anti social behaviour

[26] Joint Committee of Human Rights, 8th Report 2004-5, Para 5

[27]The term 'civil' has an autonomous meaning, and that the classification of provisions as either civil or criminal in domestic law is not decisive: *Feldbrugge v Netherlands* (1986) 8 EHRR 425. Nowak, UN Covenant on Civil and Political Rights p.241.Whether a matter will be found to be 'criminal' depends on any one of three criteria:the nature of its classification in domestic law; the nature of the offence; and the severity of the consequences: *Engel v Netherlands* (1976) 1 EHRR 647.If any one of these criteria is established, the action will be classed as criminal. The relevant issues include whether: a public body with statutory powers of enforcement institutes the proceedings; there is a punitive or deterrent element to the process; and the penalty potentially involves imprisonment: B*enham v UK* (1996) 22 EHRR 293, *Ozturk v Germany* (1984) 6 EHRR 409 and *Campbell and Fell v UK* (1985) 7 EHRR 165. It is arguable that a control order is criminal because it indirectly involves serious consequences - if any condition of the order is breached, it leads to imprisonment of up to five years It imposes a penalty on the respondent in terms of the restrictions on his or her human rights – for example freedom of movement, private and family life, and access to children. It also has a public order element, because the process is initiated by the police, on behalf of the aggrieved person.

orders (which are similar in nature, although less onerous in effect than the proposed control orders):

> 'there are good reasons, in the interests of fairness, for applying a higher criminal standard to these orders where allegations are made of a criminal or quasi criminal conduct which, if proved, would have serious consequences for the person against whom they were made'. [28]

A right to a fair hearing

25. Article 14(1) of the ICCPR requires that a person should have a reasonable opportunity to be heard when their civil rights are involved.[29] If the case is characterised as 'criminal' article 14(2) rights are also involved. Article 14(1) has been interpreted[30] to require that a litigant has real and effective access to a court;[31] notice of the time and place of proceedings; a real opportunity to present the case sought to be made; and the right to a reasoned decision.[32] However in relation to control orders under this Bill there are many restrictions that taken together amount to a significant denial of fair trial rights:

- 48 hours notice (clause 104.12 (1))
- no right to call witnesses (clause 104.14)
- restrictions on evidence that is available (clause 104.13 (2))
- restrictions on legal representation (clause 104.14 (4) (a))
- no right to a reasoned decision (clause 104.12 (1)(a)(ii))

The right to a fair hearing includes the requirement of reasonable notice. Under this Bill the person may have only 48 hours notice of a court hearing. It is not clear why this time limit is imposed or why it is necessary. A notice period of three days has been held to be insufficient under the ECHR.[33] Such a short time limit particularly disadvantages respondents with low literacy levels or who do not read the English language. This issue has been raised in the context of domestic violence orders, which involve similar procedures.[34]

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[28] See for instance *Clingham v Royal Borough of Kensington and Chelsea [2003] 1 AC 787.*

[29] The right to a fair trial should receive a broad interpretation, given the fundamental importance of procedural fairness *Delcourt v Belgium* (1970) 1 EHRR 305 and *Moreira v Portugal* (1990) 13 EHRR 721 at para 660. The Human Rights Committee has held similarly in *Morael v France* (207/1986) and other cases.

[30] As summarised by Wadham and Mountfield, *Blackstone's Guide to the Human Rights Act* 1998 at p.142

[31] *Golder v UK Series A no.18* (1975) 1 EHRR 524

[32] *Flannery v Halifax Estate Agencies* [2000] 1 WLR 377; *English v Emery Reimbold & Strick* [2002] 1 WLR 2409; *Mousaka v Golden Seagull Maritime Inc*.[2001] 1 WLR 395.

[33] *Rada Cavanilles v Spain* RJD 1998-VIII 3242

[34] The Victorian Law Reform Commission in the *Review of Family Violence Laws* in 2004 raised the concerns of many consultees about the respondent's lack of comprehension of the DVO process. They revealed that many respondents, especially those with cognitive impairments or from a non-English speaking background, do not understand the court proceedings or the outcomes of the hearing, even if the order has been translated.

26. To have real and effective access to a court there must be 'equality of arms', that is, an adequate and proper opportunity for the respondent to challenge and question the witnesses against him or her. Equality of arms guarantees the right of each party to equal access to all the evidence that is available to the court, including documents, and the right to examine witnesses. In cases involving control orders there may be restrictions on both of these. Commonwealth legislation enabling the Attorney General to restrict access to evidence on national security grounds now applies to both civil and criminal orders under the *National Security Information Legislation Amendment Act 2005*. The effect of the law is to prevent the parties to proceedings and their lawyers from having access to national security information (as defined), to exclude witnesses whose mere presence might disclose national security information from proceedings, to require security clearance for lawyers for the parties in proceedings. In addition the parties themselves will have to be security cleared before they can see national security information that may be relevant to their proceeding. This raises the possibility that the person may be subject to continuing deprivation of human rights without a realistic chance of disproving the allegations against him when seeking to revoke an order.

27. The use of control orders to impose a 'house arrest' raises extra issues as it amounts to a deprivation of liberty under article 19 of the ICCPR. Under this article a deprivation of liberty must be 'lawful' which implies that it is 'accessible',[35] and sufficiently precise for people to be able to regulate their conduct to avoid infringement.[36] Whether one's behaviour might 'substantially assist a terrorist act' may be hard to determine in advance, given the breadth of the definition of 'terrorist act'.[37]

28. The UK *Prevention of Terrorism Act* 2005 imposes for greater limits on control orders than does the Commonwealth Act. The legislation expires after 12 months and can only be renewed for another period of 12 months. This contrasts starkly with this Bill's 10 year sunset clause. At the end of each 3-month period the Secretary of State must report to Parliament on its operation, and s/he must appoint a person to review the Act. That report must also be laid before parliament. If the control order imposes house arrest the court must be satisfied that the risk the

[35] *Guzzardi v Italy* (1980) 3 EHRR 647 *Engel v Netherlands* (1976) 1 EHRR 647.
[36] *Steel and Others v UK* (1999) 28 EHRR 603.
[37] The deprivation of liberty must not be 'arbitrary' that is, its aim must be in keeping with the purpose of the anti-terrorism law. The Bill would appear to satisfy this requirement as each of the control order conditions imposed by the court must be shown to be proportionate to the terrorist threat under clause 104.3.Being preventative rather than punitive in design, the orders must be subject to continuing risk assessment, may also be unreliable and hence need to have stringent periodic view under article 19.[37] The provisions of clause 104.12 of the Bill satisfy this requirement.

order addresses constitutes a public emergency justifying derogation from the European Convention on Human Rights. There is no statutory minimum period for notice, nor a statutory restriction on witnesses in the court proceedings. Control orders are limited to 6 months in duration (but can be renewed up to 12 months - clause 6 (1) (b)).

Conclusion on control orders

29. The Commonwealth Bill does not provide sufficient procedural safeguards for control orders to satisfy the right to a fair hearing under article 14 ICCPR nor, if they amount to house arrest, the right to liberty under article 9. Although these orders are made by courts, the initial order is made ex parte. At an inter partes hearing when the order is confirmed, or on an application for revocation, the order will be almost impossible to challenge because of restrictions on evidence, short notice period and the difficulty in accessing the full information on which they are founded. There is no restriction on the numbers of control orders that can be successively imposed. Effectively a person could be under these orders for years at a time. The severe penalty of 5 years is also disproportionate.

Newly defined offence of sedition

30. The Bill proposes to amend the provisions in the *Crimes Act 1914* and the *Criminal Code 1995* relating to sedition, by inserting a new definition of 'seditious intention' and new provisions, such as urging violence within the community:

'80.2(5). A person commits an offence if

(a) the person urges a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or other groups (as so distinguished) and

(b) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.

Penalty: Imprisonment for 7 years.

80.2(6) Recklessness applies to the element of the offence that it is a group or groups that are distinguished by race, religion, nationality or political opinion that the first mentioned person urges the other person to use force or violence against.'

31. Fundamentally the need for a newly defined offence of sedition has not been established. Attempted prosecutions were made in the 1940s cases against Communist Party members: *R v Sharkey* and *Burns v Ransley*.[38] The existing sedition offence has a penalty of 3 years

[38] (1949) 79 CLR 101 and 201.

imprisonment and already targets promotion of inter-communal violence. It is also already an offence, punishable by life imprisonment, to threaten politically-motivated violence with the intention of intimidating a section of the public. A community report on the Government's proposals to replace the existing sedition provisions points out that broadening of the basis for prosecuting political speech as 'seditious' is a matter of grave concern in a liberal democracy.[39] The right to free expression has been described as:

> 'one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man (sic)…applicable not only to information or ideas that are favourably received…but also to those that offend shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.'[40]

32. Restrictions on freedom of expression under article 19 of the ICCPR (s.16 of the ACT HR Act) must be formulated with sufficient precision so that a person knows what is and is not permitted, and the case for such restriction must be strictly proved.[41] It seems that our ability to criticise the activities of Australian defence forces in countries such as Iraq will be limited. Such public debate has been an important safeguard of democracy and human rights in previous military conflict, such as in Vietnam.

33. The Federal Government has asserted that its proposals are consistent with the Gibbs Committee's. However, that Committee recommended a *narrowing* of the existing sedition offences,[42] on the grounds that as expressed they are in tension with modern democratic values,[43] and are potentially redundant.[44] It proposed limiting sedition to three specific circumstances and increasing the penalty from 3 to 7 years imprisonment:

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[39] *Laws for insecurity? A report on the federal government's proposed counter-terrorism measures*, 23 September 2005, by Agnes Chong, Patrick Emerton, Waleed Kadous, Annie Petittt, Stephen Sempill, Vicki Sentas, Jane Stratton and Joo-Cheong Tham, pp28-29

[40] *Handyside v UK* (1976) 1 EHRR 737, cited in Liberty's Briefing on the UK Draft Terrorism Bill, Sept 2005, para 13. See also The Council of Europe's Commissioner for Human Rights has warned that an offence for incitement to terrorist violence must be carefully framed so as not to include legitimate criticisms in a democratic society: A. Gil-Robles, *Opinion of the Commissioner for Human Rights on the Draft Convention on the Prevention of Terrorism*, Council of Europe, 2 February 2005.

[41] Jurisprudence under the ICCPR and under the European Convention on Human Rights have established that not only procedural requirements must be followed, but that the law itself be certain, that is 'accessible and precise: *Sunday Times v UK* (1979) 2 EHRR 245, para 49 and *Steel and others v UK* (1999) 28 EHRR 603. See also *R v Secretary of Health Ex parte Wagstaff* (2001) WLR 292

[42] *Review of Commonwealth Criminal Law* (1991). See the Committee's discussion in Attorney-General's Department, Review of Commonwealth Criminal Law, *Fifth Interim Report: Arrest and Matters Ancillary Thereto, Sentencing and Penalties, Forgery, Offences Relating to the Security and Defence of the Commonwealth and Part VII of the Crimes Act 1914* (1991) paras 32.13, 32.14, 32.16.

[43] *ibid* para 33.13

[44] *ibid* para 32.6, 32.12

- incitement to overthrow or supplant by force or violence the Commonwealth government and constitution;
- incitement to violent interference in parliamentary elections;
- incitement to the use of force by one group within the community against another.[45]

34 As stated in the Commissioner's advice of 19 September 2005, it is not clear what the inter-relationship will be between this proposed offence and existing Commonwealth, State and Territory laws protecting against racial and other vilification, for example religion in Victoria.[46] This formulation of the new definition of sedition may be too broad to satisfy article 19 of the ICCPR (s.16 of the ACT HR Act), and so overreaching as to be disproportionate to the objectives of the law. For example the newly defined offence may catch a journalist's article where it inadvertently triggers a terrorist act,[47] capture opinions that do not lead to terrorist acts, and critics have suggested that it may cover private conversations.[48]

35. It is therefore particularly worrying that the defence of good faith available under clause 80.3 appears to cover only political expression. While freedom of expression may be restricted as provided for by law (ICCPR article 19(3)), any restrictions must be justifiable as necessary to achieve one of the objectives specified in article 19(3), and are subject to an element of proportionality.[49] Limiting journalistic and artistic expression and 'fair comment' reporting would be clearly disproportionate and would threaten to seriously undermine much-needed public debate in society. The Human Rights Committee points out that 'when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself'.[50] Furthermore, the defence of good faith puts the evidential onus on the accused. It is also unclear if this includes the constitutional doctrine of implied freedom of political communication.[51]

Conclusion on sedition offence

36. As formulated the sedition offences are too great an infringement of the right to freedom of expression under article 19 ICCPR to be proportionate to the objectives of the law. They should be abandoned. A careful and thorough examination of the existing law should be

[45] *ibid* para 32.18
[46] *Racial and Religious Tolerance Act 2001* (Vic).
[47] T. Allard, "Fear that Law Changes Will Curb Free Speech,' *The Sydney Morning Herald*, 9 September 2005.
[48] C. Merritt, *The Australian*, 14 September 2005.
[49] *Faurisson v France* (550/93).
[50] Para 4, Human Rights Committee General Comment No 10.
[51] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and *Levy v Victoria* (1997) 189 CLR 579.

undertaken, with extensive consultation, before such radical changes are made. The need for law to protect minorities from racial and religious vilification should also be undertaken but not as part of a law of sedition.

ACT Human Rights Office
Friday, 11 November 2005