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Senator Payne
Chair, Senate Legal and Constitutional Legislation Committee
Department of the Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Payne,

Re: Commonwealth Anti-Terrorism Bill (No. 2) 2005

I refer to Senator Kirk's Question, which I took one notice at your Committee's hearing in Sydney on 17 November 2005. Thank you for the opportunity to meet with your Committee and for accepting our submission on this important Bill. I also include an attachment on the proportionality test, which was accidentally not appended to our submission of 11 November 2005. There are four main themes from our previous submission that I would like to emphasise, as they impact primarily on the right to a fair trial under the ICCPR. In all four cases I have made practical recommendations that can be implemented to make the Bill more effective, as well as increasing human rights protections.

1. We remain concerned that the person subject to control (or preventative detention) orders is not given sufficient information to be able to challenge its validity in full judicial (or merits) review proceedings. In the case of control orders the person should be given the same information presented by the Australian Federal Police to the Attorney-General, rather than a simple summary. There is sufficient protection of national security interests under the Attorney-General's certification power in the *National Security Information (Criminal and Civil) Proceedings Act 2004*.
2. We recommend that there be a specific time frame for initial control orders to be confirmed, rather than allowing the court issuing the initial order ex parte to make a return date. Also the 48 hours minimum notice before the full hearing does not constitute a reasonable opportunity to be heard, particularly given the possibility that the person subject to the order may need translation of documents and/or an interpreter. In the UK the control order lapses in 7 days, unless a court

confirms it. This automatic 7-day mechanism is preferable to the current provision requiring the court to set a return date, which may be a long period less than 12 months. Also the possibility of successive control orders needs to be addressed, as a person who has not committed an offence could be placed under more onerous forms of control, such as house arrest, for many years.

3. Professional confidentiality between lawyer and client needs to be preserved. This is breached in the case of preventative detention, as Police monitor communication within hearing, as well as sight of the conversation between the detainee and his or her lawyer. In the UK this is an exceptional situation. It is preferable for lawyers to obtain full access to security information, even if the client is unable to be informed as to its content, so that legal representation is full and effective. There are precedents in several areas where a person's lawyer may be given information that they themselves are prevented from accessing, eg therapeutic privilege. Having an independent and expert Special Advocate with full access to national security information to assist the court could be an additional safeguard. In the UK the Proscribed Organisations Appeal Committee and the Special Immigration Appeals Committee have similar roles to counsel assisting Royal Commissions.

4. The person subjected to preventative detention should be able to communicate more information to third parties. In the UK the detained person may disclose the fact and place of detention. The 5-year penalty for disclosing information about preventative detention is grossly disproportionate, particularly as this criminal offence applies to essentially a civil and administrative process of detention. In the UK there is no disclosure offence. The standard of proof applicable to this disclosure offence is also unclear.

I also support proposals to excise the new definitions of sedition from this Bill, and subject them to further intensive scrutiny and public debate. There are many other further comments that could be made about the Bill, but I will only mention four of the most pressing issues:

- Less restrictive alternatives should be considered using a proportionality test in the cases of preventative detention and control orders to achieve the objective of preventing terrorism;
- Preventive detention of a young person between the ages of 16-18 years of age is not a measure of last resort as required under the Convention on the Rights of the Child;
- Rights of review of preventative detention orders need to be clarified, as it appears that AAT merits review is limited to periods after detention, and judicial review is restricted

and may not be available under s.39D of the *Judiciary Act 1903*, as issuing authorities may net meet the definition of a 'Commonwealth officer';

- It appears that the Federal *Evidence Act 1995* (in particular sections 84 and 34J) may not be applicable to information collected and used in making preventative detention (and possibly control order) decisions, and therefore does not expressly exclude material obtained through torture or inhuman and degrading treatment (for example obtained overseas), which would be in breach of article 7 of the ICCPR, as well as the Convention Against Torture And Other Cruel Inhuman or Degrading Treatment.

Yours sincerely,

Dr Helen Watchirs
ACT Human Rights and Discrimination Commissioner
25 November 2005

APPENDIX: The Proportionality Test

Under section 28 of the *ACT Human Rights Act 2004* restrictions are justified as follows: 'Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.'

This test is also relevant to the Federal government's obligations to implement the rights in the International Covenant on Civil and Political Rights. Restrictions on rights should be narrowly construed, and the burden of establishing proportionality lies on the party that seeks to apply it, that is on the government: *Smith and Grady v UK*.[1] The main elements of the proportionality test are established by the Canadian case of *R v Oakes.*[2] The European Court of Human Rights, the UK courts and the New Zealand courts have also taken a similar approach: *Sunday Times v UK*;[3] *Ministry of Transport v Noort;*[4] and *Ghaidan v Godin-Mendoza*.[5]

The test involves two closely related concepts. First to be 'demonstrably justified in a democratic society', there must be a legitimate objective, that is one of sufficient importance to justify overriding human rights. Secondly the measure must be proportional. There must be a rational connection between the public policy objective and the means that the state uses to pursue that objective: *James v UK* (1986).[6] The measure must strike a fair balance between the demands of the general interest of the community and the protection of the individual's human rights. The measures must not go beyond what is necessary to achieve that objective. As a means of testing proportionality the court may enquire whether the government could have achieved the same objective by other means: *Campbell v UK*.[7] The particular objective of eliminating terrorism is a legitimate objective. However, it is not clear that the proposals are of sufficient importance to override rights, particularly when these aims could be achieved in a different way.

The Oakes case held that to be proportionate:

- the limitation/s must be carefully designed to achieve the relevant objective, not be arbitrary, unfair, or based on irrational considerations;

[1] (2000) 29 EHRR 493 at para. 73.
[2] [1986] 1 SCR103. A similar approach has been endorsed by the Privy Council in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1998] 3 WLR 675.
[3] (1979-80) 2 EHRR 245.
[4] [1992] 3 NZLR 260.
[5] [2004] UKHL 30.
[6] 8 EHRR 123 at 50.

- the limitation or interference should impair as little as possible the right in question; and
- even if the objective is of sufficient importance and the first two elements of the proportionality test are satisfied, it is still possible that because of the severity of the deleterious effects of a measure on individuals or groups the measure will not be justified by the purpose it is intended to serve'.

There is a rational connection between the objective of eliminating terrorism. However, it may not 'carefully designed' to achieve the relevant objective as the provisions could have severe and deleterious effects on a person's right to liberty and a fair trial in relation to preventive detention, and freedom of movement and rights to privacy and family life in relation these extended police powers. Consequently there needs to be an analysis of whether there is some other reasonable way for the legislature to satisfy the objective that would not impair the right at issue, or that would have less impact on the right than does the law under review: *Edwards Books and Art Ltd v R.*[8]

[7] (1993) 15 EHRR 394 at para 44.
[8] [1986] 2 SCR 713 at 772.