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

11 November 2005

Dear Committee Secretary,

**SUBMISSION ON INQUIRY INTO THE PROVISIONS OF THE ANTI-TERRORISM BILL (NO. 2) 2005**

We write to make a submission to the Senate Legal and Constitutional Committee's Inquiry into the provisions of the Anti-Terrorism Bill (No. 2) 2005 (the Bill). The submission is made on behalf of the Sydney Centre for International and Global Law of which we are Associates. The submission does not seek to represent the views of the University of Sydney.

The submission addresses the following issues:

- Terrorists and Human Rights;
- The Bill and Human Rights;
- Consistency of the Bill with Australia's obligations under international law;
- State of Emergency Exception under the ICCPR;
- Restriction or Limitations upon Individual Rights; and
- Implications for Australia if the Bill becomes law and is considered inconsistent with Australia's obligations under international law.

**TERRORISTS AND HUMAN RIGHTS**

1. We understand that a major thrust of the Bill is to address terrorist acts and to counter-terrorism within Australia. Accordingly, the object of the Bill is persons suspected of committing or potentially committing terrorist offences. This raises a threshold question as to whether persons who are suspected terrorists enjoy certain human rights protections.

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2. We would make the initial point that under relevant international human rights instruments, 'Everyone' is entitled to rights and freedoms without distinction. This extends to both persons accused and suspected of certain offences. [1]

3. We also note that since the terrorist attacks upon the United States in September 2001, the United Nations Security Council and the United Nations General Assembly has consistently indicated that all responses by members of the international community to terrorist acts are to be consistent with the rule of law and international human rights law. For example, Commission on Human Rights Resolution 2003/68 adopted on 25 April 2003 provides that:

> 3. Affirms that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights
>
> …
>
> 6. Encourages States, while countering terrorism, to take into account relevant United Nations resolutions on human rights, and encourages them to consider the recommendations of the special procedures and mechanisms of the Commission on Human Rights and the relevant comments and views of the United Nations human rights treaty bodies. [2]

4. Likewise, in June 2003 the Special Rapporteurs/Representatives, Experts and Chairpersons of the United Nations Commission on Human Rights issued a joint statement in which they sought to:

> Voice profound concern at the multiplication of policies, legislation and practices increasingly being adopted by many countries in the name of the fight against terrorism which affect negatively the enjoyment of virtually all human rights – civil, cultural, economic, political and social. [3]

The statement continued by noting:

> They strongly affirm that any measures taken by States to combat terrorism must be in accordance with States' obligations under the international human rights instruments.

5. More recently, we note that in March 2004, the United Nations General Assembly in Resolution 58/174 reaffirmed the link between human rights and terrorism. Noting that terrorism is itself a violation of human rights, and that combating it must be pursued consistent with established international norms, the General Assembly reaffirmed that:

> …all measures to counter terrorism must be in strict conformity with international law, including international human rights standards and obligations. [4]

6. Australia and the rest of the international community has therefore been placed on notice that any action it takes to address terrorism or counter terrorism must be consistent with international law and especially international human rights.

## THE BILL AND HUMAN RIGHTS

7. We note that the government's stated basis for much of the Bill was its response to the implications for Australia of the July 2005 terrorist bombings in London. We note the meeting of the Council of Australian Governments (COAG) on 27 September 2005 called to consider Australia's national counter-terrorism arrangements. The Communiqué issued at the end of the COAG meeting makes only one express reference to human rights. It states:

> Consistent with Australia's international human rights obligations, any person being preventively detained must be treated with humanity and respect for human dignity and must not be subjected to cruel, inhuman or degrading treatment. [5]

8. However, the Chief Minister of the Australian Capital Territory, Mr Jon Stanhope, on the day of the COAG meeting issued a Media Release indicating that the Prime Minister had given certain guarantees at the meeting, including that the laws would:

> "comply with all of Australia's obligations under international law – in particular its obligations as a signatory to the International Covenant on Civil and Political Rights." [6]

9. Notwithstanding these assurances, we note no reference was made to the consistency of the Bill with Australia's international human rights obligations in either the Second Reading speech of the Attorney-General or in the Explanatory Memorandum to the Bill. [7]

## CONSISTENCY OF THE BILL WITH AUSTRALIA'S OBLIGATIONS UNDER INTERNATIONAL LAW

10. The Bill contains a number of provisions (to be elaborated upon in the following paragraphs) which we believe do not appear to be consistent with Australia's obligations under International law, chiefly under the International Covenant on Civil and Political Rights (ICCPR) [8] and the International Covenant on Economic, Social and Cultural Rights (ICESCR). [9] These provisions of the Bill include, *inter alia*, provisions regarding Control Orders, Preventative Detention Orders and Sedition.[10]

11. Broadly speaking, these ICCPR obligations relate to the rights to liberty, fair trial and privacy as set out in Article 9 (right to liberty and security of person and the right to be free from arbitrary detention), Article 10 (right to be treated with humanity including provisions for the protection of children in detention), Article 12 (freedom of movement), Article 14 (right to a fair and public hearing by a competent, independent and impartial tribunal), Article 17 (freedom from arbitrary or unlawful interference with privacy), Article 18 (Freedom of thought, conscience and religion), Article 19 (freedom of expression) and Article 22 (freedom of association).

12. The Bill provides for Control orders under Division 104 of Part 1 of Schedule 4. Subdivision 104.1A states that the object of this Division is to "protect the public from a terrorist act". Subdivisions B and C respectively provide for the making of control orders and urgent control orders.

13. Under the Bill, control orders may be requested by a senior AFP member (the member) with the Attorney-General's written consent in relation to a person "if the member: (a) considers on reasonable grounds that the order in the terms to be requested would substantially assist in preventing a terrorist act; or (b) suspects on reasonable grounds that the person has provided training to, or received training from, a listed terrorist organisation".[11]

14. Section 104.4 of the Bill provides that the issuing court may make an *ex parte* order in response to an application by a member to a court [(in accordance with sections 104.3 and 104.8 (for urgent control orders)]. The Court must be 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".[12]

15. The Bill provides for control orders to be made for a maximum term of 12 months but successive control orders could be made in relation to the same person.[13] The terms of an interim control order under section 104.5 may include restrictions or prohibitions on a person's presence at a specified place, leaving Australia, work, communication with specified people, using specified forms of telecommunication or other technology, and possessing or using specified articles or substances. Under the Act, a control order may also require the person to remain at home or at specified premises, to report to specified persons at specified times and places, to be photographed and fingerprinted, and participate in specified counselling or education.[14]

16. The control order provisions are potentially in breach of a number of ICCPR and ICESCR guarantees as stated above. In particular, the following procedural shortcomings are potentially in breach of Articles 9 and 14 of the ICCPR:
    - the ex parte nature of the process to obtain a control order is fundamentally unfair to the accused person because he or she cannot present his case to the court and is not informed of the reasons underlying the control order[15];
    - the control order is not based on evidence but a federal police officer's belief as to what the facts are;
    - revocation of an order requires an accused person to apply to a court without knowing the basis for the order; and
    - the civil standard of proof is arguably not the appropriate standard given the severe restrictions that can be imposed on an accused person. Hence arguably, the proceedings should be characterized as criminal and the criminal standard of proof be applied.

17. In addition, as stated above, the terms of a control order may include a number of restrictions and prohibitions which could potentially breach ICCPR provisions. These include:

    - restrictions on travel and movement (Article 12, freedom of movement);

- the use of tagging devices (Article 17, freedom from arbitrary or unlawful interference with privacy);
- prohibitions on membership of certain groups (Articles 18 and 22 denoting respectively freedom of thought, conscience and religion and freedom of association); and,
- house arrest (Article 9, right to liberty and security of person and the right to be free from arbitrary detention).

18. In summary, we are of the view that the Bill does not provide adequate safeguards to prevent potential breaches of the ICCPR guarantees in relation to the control orders and hence needs to be reconsidered in light of the above and similar other concerns.

19. The preventative detention orders aimed at those individuals who have not committed any offence is a serious breach of their core human rights. If such a mechanism is regarded as fundamental to combat the threat of terrorist acts, it is absolutely imperative that a checks and balances system be implemented which is in conformity with Australia's international human rights obligations under the ICCPR. The Bill outlines a mechanism whereby the executive could institute a procedure of preventative detention. Under the Bill, a person may be detained for up to 48 hours. An order by a member of the rank of superintendent or above may be made for detention for up to 24 hours ("initial preventative detention order"). An "issuing authority", acting in his or her personal capacity may extend the initial order by an additional 24 hours (a "continuing preventative detention order").[16] The Bill does not provide for 14 days preventative detention but it has been foreshadowed that this will be provided for in State and Territory legislation.

20. The Bill states that the object of the preventative detention order regime is to prevent an imminent terrorist act occurring or to preserve evidence relating to a terrorist act.[17] In order for a preventative detention order to be issued, the issuing authority must be satisfied that there are "reasonable grounds to suspect" that the subject: will engage in a terrorist act; he or she possesses something connected to a terrorist act; or the person has done an act in preparation for a terrorist act.

21. Under the Bill, the issuing of the order must substantially assist in preventing a terrorist act and detention must be reasonably necessary for that purpose. The terrorist act must be expected to occur within 14 days. In addition, a detention order may also be made where it is necessary to detain a subject to preserve evidence relating to a terrorist act which has occurred in the last 28 days and detention is necessary for that purpose.

22. There is no requirement in the 48 hours of the operation of a detention warrant for the detainee to be taken before a judicial officer operating in that capacity. In the first 24 hours the detention order is completely in the hands of the police. Thereafter a continuing detention order may be made by a designated person who may be a judge or retired judge. Such persons are not "judicial officers". However, at no time is the detained person required to be taken before a court.

23. Article 9 of the ICCPR protects a person's right to liberty. Article 9(2) specifically requires that a person detained be "brought promptly before a judge or other officer authorised by law to exercise judicial power". The failure of the Bill to provide for that to occur means that it breaches Article 9 of the ICCPR.

24. The Bill envisages a system of executive detention for both an interim and a continuing detention order. Regarding interim orders, the Bill sets out a procedure for certain information and documentation to be put before an issuing authority: s.105.7. There is no apparent reason why the same application could not be made to a judicial officer for the issue of a warrant for the detention of a person on the same basis given the detail which is required to be given to a senior AFP officer. Both State and Federal Police are experienced in applying for warrants at short notice so this should not be an operational impediment. 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 process breaches Article 9(1) of the ICCPR.

25. Once in custody the detained person must be informed of the detention order and his or her ability to contact a lawyer and the right to apply to a court. The detained person is given a copy of the order and the grounds upon which the detention order was sought. He or she is not allowed to communicate with anyone except certain limited classes of person. Even then the detainee may be prohibited from contacting particular persons such as a specific lawyer without a security clearance or a specific family member. This is an unnecessary and disproportionate infringement on the detainee's right to privacy (Art 17) because the detainee may assume that contact is not possible or, worse, prohibited.

26. Part of the guarantee for detained persons contained in Article 9(3) is that the detainee must be able to challenge the grounds for his or her detention before a judicial officer. As the Bill is currently drafted all a detainee could do is seek to challenge the preventative detention order in a limited way. That is, by way of an application to the Federal Court for a writ for habeas corpus the detainee could only challenge the detention on the basis of legality or narrow procedural grounds. Even the limited judicial review grounds available under the *Administrative Decision (Judicial Review) Act 1977* are denied to the detainee: Schedule 4, Part 2, Item 25.

27. Full merits review of the basis of the detention is required by operation of Article 14 (right to a fair trial). The interim and continuing detention procedures are *ex parte* and at no stage is it envisaged that the detainee can challenge the basis for his or her detention on an *inter partes* basis. That is, the real reason for the detention is unreviewable in any substantive way. The restrictions placed on review are, accordingly, a breach of Article 14(1) of the ICCPR which applies to adjudication of such detentions.[18]

28. Detention orders are available for children aged 16 to 18 but not for children under 16. The *Convention on the Rights of the Child* (CROC) [19] includes children who are

under 18 years old and therefore the provisions of the Bill affecting 16 and 17 year olds are caught by its provisions. Article 37(b) of CROC requires that detention be used for children as a last resort.

29. It is the definition of "last resort" that is significant. The primary basis for preventative detention is that a police officer holds a suspicion on reasonable grounds of certain matters. Clearly there are some steps to go before the suspicions are resolved and, therefore, logically the "last resort" has not been achieved. If the suspicion is resolved to the extent that the child may be arrested on suspicion of having committed an offence then normal criminal procedures may be used for the arrest and, subject to a bail hearing, the child may be remanded in custody.

30. The communication by adult detainees with family members provision set out at s.105.35 is unnecessarily restrictive in four ways: only one family member may be contacted, the contacted person may not communicate with other family members, the manner of communication is very restricted (fax, email or telephone) and the communication is monitored. The provision is clearly drafted on the apparent assumption that any communication with a family member is likely to be damaging to an ongoing investigation or police operation. If that is the case then it should be explicitly made a test in s.105.35 for the police officer to establish prior to preventing communication rather than the blanket way with which communication is prohibited.

31. Further a parent, spouse or child of an adult detainee, other than the person who is contacted by the detainee under s.105.35, cannot be informed of the detention at all. Section 105.41(6) prohibits a family member who is contacted by a detainee from providing to other family members the fact of the detention, the period of detention or "any information" that a person detained communicates to the family member. This means that a wife contacted could not contact the couple's children or the detainee's parents.

32. Incommunicado detention has been the subject of adverse comment by the Human Rights Committee with respect to the ICCPR because it is in those circumstances that torture has taken place.

33. Regarding child detainees, the guardians who may visit a child detainee may only stay, as of right, with the detainee for 2 hours within a 24 hour period. One can clearly envisage a very frightened 16 year old who is detained incommunicado without contact with his or her family for 22 hours out of 24. Again there are offences imposed for telling other siblings or grandparents and relatives about what has happened to the child.

34. The prohibitions on communication are extreme and by no means necessarily called for by the situation. Communication with family members should be allowed as of right unless there is clear and cogent evidence that the communication will prejudice investigations or an operation. Otherwise the current restrictions because of their disproportionately contravene the right to family life (Art 17).

35. Communications between lawyer and detainee are monitored by the police and must be in English for this purpose (unless an interpreter is available). The privileged and confidential nature of communications with a lawyer is a necessary concomitant of the right to a fair trial (Art 14(3)). It is well recognised in Australian common law and also in human rights jurisprudence that access to a lawyer allows for the proper presentation of a client's case to a court. The reason is clear. If the content of the communications with a lawyer are provided to the other side then the person being represented will not be able to freely and completely seek the advice of the lawyer concerned. This in fact may hamper the ability of a court to resolve the matter whether in the prosecution's favour or not.

36. The same provision which prevents family members contacted by a detainee also makes it an offence for the media to report a detention while it is taking place: s.105.41(6). Provision of such information to the media serves a number of legitimate public purposes not necessarily inimical to the police or the Government. It exposes to the public the fact that there is a threat of some description with respect to which the police are taking action. It means that the public, including the person's relatives, know of the detention of a person who would otherwise be held incommunicado. The media may also monitor detentions which might be unlawful and assist in exposing illegality or malfeasance by public officers (including the police).This provision is also extreme because it assumes that media coverage will be detrimental to the police operation. That assumption is disproportionate to the apparent threat posed by the communication and hence it offends freedom of speech (Art 19(2)).

37. In summary, we are again of the view that the Bill does not provide adequate safeguards to prevent potential breaches of the ICCPR guarantees in relation to the preventative orders and hence needs to be reconsidered in light of the above and similar other concerns.

**STATE OF EMERGENCY EXCEPTION UNDER THE ICCPR**

38. The ICCPR provides an important exemption during a state of emergency. Article 4 of the Covenant states as follows:

> Article 4 (1)
>
> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
>
> Article 4 (2)
>
> No derogation from articles 6, 7, 8, (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

39. The state of emergency exception permitted under Article 4 allows for derogation from certain provisions of the ICCPR, including Articles 9 and 10. However, for such a derogation to occur, strict conditions need to be met.

40. In its General Comment No. 29 of 31 August 2001, the United Nations Human Rights Committee gave detailed consideration to the circumstances envisaged under the Article 4, ICCPR, States of Emergency exception. The Human Rights Committee emphasized that any derogation "must be of an exceptional and temporary nature". [20]

41. The Human Rights Committee went on to note in General Comment No. 29:

> Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. The latter requirement is essential for the maintenance of the principles of legality and the rule of law at times when they are most needed. [21]

42. An initial assessment of Australia's current state as at the time of consideration of the Bill suggests that these criteria have not been met. There is no evidence of a public emergency which threatens the life of the nation. Whilst concerns have been raised about the activities of certain individuals, members of local terrorist cells, or members of international terrorist cells operating within Australia, no evidence has been presented to suggest that these individuals or groups of persons threaten the life of the nation. We note that the Attorney-General, Mr Ruddock, made no mention of any such threat to the life of the nation in his Second Reading speech of 3 November 2005. [22] We also note that no reference is made to any threats to the nation in the *Explanatory Memorandum* accompanying the Bill. [23]

43. We also note that no proclaimed state of emergency has been issued by the government. We contrast the position in Australia with that existing (at the time of writing) in France, where an extraordinary state of emergency was proclaimed on midnight 9 November 2005 in response to a nationwide state of unrest. [24]

44. In addition to the requirements for an Article 4 derogation to take place, the Human Rights Committee has also stressed the need for the proposed measures to be limited to the extent strictly required by the exigencies of the situation, thus reflecting a principle of proportionality. The Committee has noted:

> This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. [25]

45. In this respect, whilst it is noted that s.4 of the Bill envisages a review of the anti-terrorism laws at the end of a five year period. This is to be distinguished from a sun-set clause, which would provide either for the expiry of the laws after a defined period of time or give to the Parliament an opportunity to re-enact the legislation.

46. We note that certain parts of the Bill anticipate a 'sun-set' at the expiry of 10 years. [26] Whilst the insertion of such a provision is welcome, it appears to be grossly

disproportionate to any 'emergency' that Australia may be facing and does not seem to be directly related to any particular events such as terrorist acts that have taken place within Australia, or have been planned in Australia. Accordingly, there is nothing in the Bill as currently drafted which limits the operation of the envisaged laws to a proclaimed state of emergency consistent with the terms of article 4, ICCPR.

47. Finally, in this regard, it must be noted that article 4 (3) ICCPR provides:

> Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated.

We are not aware of Australia having provided any notification to other State Parties to the ICCPR through either bi-lateral channels or the United Nations Secretary-General of Australia's intention to derogate from the provisions of the Covenant. [27]

**RESTRICTIONS OR LIMITATIONS UPON INDIVIDUAL RIGHTS**

48. We note that the Attorney-General, Mr Ruddock, has in recent weeks alluded to the fact that rights are not absolute under Australian law. In a BBC interview of 31 October the Attorney-General noted:

> People talk about the right to freedom of speech but in Australia … you cannot use it to damage somebody's reputation falsely, and defamation laws apply. In relation to freedom of movement, you can't choose which side of the road you'll drive on to put somebody else's life at risk. [28]

Mr Ruddock substantially repeated these views on ABC Radio on 4 November. [29]

49. International human rights laws does not provide that all human rights are absolute. In some instances, there is a need to balance the rights of the community against the rights of the individual. This is recognised in the ICCPR, article 4, in times of emergency as noted above. In addition, certain other rights may be subject to some limitation.

50. The freedom of speech referred to by the Attorney-General above is outlined in article 19, ICCPR. That article indicates that the "freedom of expression" carries with it "special duties and responsibilities" including "respect of the rights or reputations of others". Accordingly, laws dealing with defamation are entirely consistent with the ICCPR.

51. In relation to the liberty of movement and freedom to choose a residence (ICCPR, article 12), these rights may be restricted:

- When provided by law;
- Are necessary to protect national security, public order (*ordre public*), public health or morals or the freedoms of others; and

- Are consistent with the rights recognized in the Covenant.

Under this provision, reporting conditions placed upon persons granted with bail following charges having been laid for a criminal offence, or conditions on the movement of persons on parole are justifiable. Likewise, to ensure public order article 12 would support limitations on persons driving their motor vehicles on the right side of the road in Australia.

52. The issuing of a Control Order under s. 104.5 [Schedule 4, Part 1 of the Bill] may therefore be justifiable consistent with the ICCPR providing such measures can be justified as being necessary for national security or public order. However, given the exceptional nature of such controls, a high evidentiary threshold exists to support such measures. We note that no such substantiation has been made in either the Attorney-General's second reading speech or in the Explanatory Memorandum accompanying the Bill. Any deprivation of a person's liberty as a result of the issuing of a Control Order must also be consistent with the provisions of articles 9 and 10, ICCPR, noted above.

53. Therefore, whilst certain human rights as identified in the ICCPR are not absolute, there remains an important obligation upon any State seeking to restrict those rights to demonstrate such restrictions are consistent with the provisions of the Covenant and in particular are for the protection of national security or public order. Whilst the Government has asserted that parts of the Bill are for the purposes of national security, we are not aware of any formal argument that the Government has presented in relation to the precise terms of this Bill justifying it on the grounds of national security.

**Implications for Australia if the Bill becomes law and is considered inconsistent with Australia's obligations under international law**

54. Being a party to an international convention carries with it an obligation of good faith. This obligation is reflected in the 1969 Vienna Convention on the Law of Treaties, to which Australia is a party, [30] article 26 of which provides:

> Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

This rule of treaty law – known as 'pacta sunt servanda' – is a fundamental rule of international law. Therefore, being a party to an international treaty such as the ICCPR carries with it solemn international legal obligations to ensure that the Covenant's provisions are respected.

55. A related provision, is article 27 of the Vienna Convention on the Law of Treaties which provides:

> A party my not invoke the provisions of its internal law as justification for its failure to perform a treaty.

Australia would not therefore be able to rely upon the provisions of the enacted Bill as justification for its failure to meet its international obligations under the ICCPR.

56. Breach of the provisions of a treaty by Australia will result in certain international legal consequences under the Vienna Convention on the Law of Treaties. [31] It will also incur for Australia state responsibility under international law, which subject to any determination being made by an international court or tribunal, could result in Australia having to make reparations to any State, person, or persons suffering damage or injury as a result of the operation of the law. [32] .

57. Individuals who have had their international human rights violated as a result of the operation of the law have available to them the capacity to submit a written communication to the United Nations Human Rights Committee via a mechanism provided for under an Optional Protocol to the ICCPR. [33] If the Human Rights Committee were to find that the operation of the law violated the human rights of the individual in question, Australia would be expected to respond to the views of the Committee and amend or repeal the law. Australia has previously taken this course of action following the views issued by the Committee in the matter of *Toonen and Australia*. [34]

58. Finally, Australia would also need to consider the implications arising from a finding that enactment of the Bill violated international human rights standards. Governments in recent decades have often claimed Australia is a "good international citizen". We would argue that one of the essential elements of such a concept is that Australia follows the rule of international law. Any breach, therefore, of international law by Australia, represents a diminution of Australia's standing in the international community which as we have outlined above can have significant international consequences. These consequences are ones not only for Australia's multilateral obligations, but also for Australia's bilateral obligations and relationships. They also have implications for Australia's capacity to seek to enforce international law obligations upon other States when Australia forms the view that a breach of international law – whether it be international trade law, international fisheries law, or international environmental law – has occurred.

We urge the Committee to take these matters into account in its review of the Bill.

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**Endnotes**

[1] See Universal Declaration on Human Rights, article 2 which provides "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind…".

[2] "Protection of human rights and fundamental freedoms while countering terrorism" Commission on Human Rights resolution 2003/68 (25 April 2003).

[3] Report of the Tenth Meeting of Special Rapporteurs/Representatives, Independent Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights and of the Advisory Services Programme (Geneva, 23-27 June 2003) UN Doc.E/CN.4/2004/4.

[4] United Nations General Assembly Resolution 58/174 (10 March 2004).

[5] Council of Australian Governments *Special Meeting on Counter-Terrorism Communiqué* (27 September 2005) Attachment.

[6] Jon Stanhope "COAG Agreement a Victory for Human Rights" (27 September 2005) at <www.chiefminister.act.gov.au/media.asp/>.

[7] House of Representative (Parliament of the Commonwealth of Australia) *Anti-Terrorism Bill (No. 2) 2005 Explanatory Memorandum* (2005).

[8] [1980] Australian Treaty Series No. 23; Australia became a party to the Covenant on 13 November 1980.

[9] [1976] Australian Treaty Series No. 5; Australian became a party to the Covenant on 10 March 1976.

[10] Schedules 4 and 7 of the Bill respectively focus on Control orders and preventative detention orders, and, Sedition.

[11] s104.2

[12] s104.1(d)

[13] s104.1(f) and 104.2.

[14] S104.5(3)

[15] This is in contradistinction to the UK *Prevention of Terrorism Act* 2005 which provides for both *ex parte* and defended hearings.

[16] Persons who may be an issuing authority are Federal Court judges or Federal magistrates, retired judges from the States or the AAT President.

[17] s.105.1.

[18] See comment of the Human Rights Committee (United Nations) UN Doc. CCPR/C/79/Add.81, para 27 (1997) (concluding observations on India); noted in Andrew Byrnes, Hilary Charlesworth, Gabrielle McKinnon "Human rights implications of the Anti-Terrorism Bill 2005" (18 October 2005) at <www.chiefminister.act.gov.au/>.

[19] [1991] Australian Treaty Series No. 4; Australia became a party to the Convention on 16 January 1991.

[20] Human Rights Committee (United Nations) *General Comment No.29 States of Emergency (Article 4)* UN Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001) [2].

[21] Ibid.

[22] Hansard, House of Representatives, 3 November 2005, 66-68.

[23] House of Representative (Parliament of the Commonwealth of Australia) *Anti-Terrorism Bill (No. 2) 2005 Explanatory Memorandum* (2005).

[24] MSNBC.com "French official wants foreign rioters deported: Curfews imposed in Nice, Cannes during 12-day state of emergency" (9 November 2005) at www.msnbc.com/id/9891709; and ABC Online "State of Emergency declared in Paris" (10 November 2005) at www.abc.net.au/am/content/2005/s1502392.htm.

[25] Human Rights Committee (United Nations) *General Comment No.29 States of Emergency (Article 4)* UN Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001) [4].

[26] Schedule 4, Part 1, s. 104.32; Schedule 4, Part 1, s. 105.53; Schedule 5, Subdivision D, 3UK

[27] For comment, on this requirement see Human Rights Committee (United Nations) *General Comment No.29 States of Emergency (Article 4)* UN Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001) [17].

[28] Mr Ruddock (Attorney-General's Department) Transcript – Interview BBC 'Hardtalk' London (31 October 2005).

[29] ABC Radio 'The World Today' 4 November 2005 at www.abc.net.au/worldtoday/2005/s1497863.htm.

[30] [1974] Australian Treaty Series No. 2; Australia became a party to this Convention on 13 June 1974.

[31] Vienna Convention on the Law of Treaties, article 60.

[32] As there is a potential for the law to have operative effect upon non-Australian citizens or dual citizens, the interests of other States in the operation of this law should not be dismissed.

[33] [1991] Australian Treaty Series No. 39; Australia became a party to the Protocol on 25 December 1991.

[34] United Nations Human Rights Committee, Views of the Committee on Communication No 488/1992 (1994); resulting in the enactment of the *Human Rights (Sexual Conduct) Act 1994* (Cth).