Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600
Email: legcon.sen@aph.gov.au

Dear Sir/Madam,

Inquiry into the provisions of the Anti-Terrorism Bill (No. 2) 2005

This submission is made on behalf of residents of Manly, NSW and surrounding suburbs who, at a 'Speaking Up for Democracy' public forum on Sunday 6 November 2005 voted to form a Northern Beaches Civil Rights Forum to

a) Make a submission to the Senate Committee investigating the proposed anti-terrorism legislation voicing our concerns about it impact on our civil liberties, and
b) organise further meetings and dialogue in order to monitor the impact of this legislation on our civil liberties.

With just over a week between the inception of the event and its occurrence on Sunday 6 November, the forum attracted more than 200 concerned citizens, all but two of whom voted in support of the above motion from the floor.

The Northern Beaches Civil Rights Forum (hereafter refereed to as the Forum) recognises the evils of terrorism, the need for its control and the Government's obligation to protect individuals from terrorist acts. However, the Forum believes that the proposed legislation sweeps away civil liberties that Australians have enjoyed over decades and radically compromises human rights principles that have been established over centuries.

Never before, even during world conflict and during the Cold War, during which the threat of a nuclear strike was high, have such extraordinary measures been proposed.

The need for these Anti-Terrorism laws?

We feel that the government has failed to demonstrate the need for these draconian laws. The ACT Human Rights and Discrimination Commissioner, Dr Helen Watchirs, in advice to the ACT Chief Minister[1], says she believes the existing laws are adequate to protect against the present terrorism risk, which the national counter-terrorism alert level has held at medium since September 11, 2001 and despite more recent terrorist acts overseas perpetrated against Australian citizens.

The Senate committee will be well aware that arrests on terrorism charges have been made this week in Melbourne and Sydney. The Forum believes these arrests illustrate two things: that present laws are sufficient for police and the intelligence services to do their job in fighting terrorism; and that in a supposedly open society such as ours it is better

[1] Dr Helen Watchirs (19 Oct 2005). Letter to Chief Minister Jon Stanhope Re: Commonwealth Anti-Terrorism Bill 2005. www.hro.act.gov.au

that such a fight be conducted in the full glare of public scrutiny rather than, as is proposed, in a shadowy world of secrecy and limited accountability.

Many of Australia's most eminent lawyers and judicial figures have highlighted ways in which the Bill contravenes the provisions of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a signatory. Under the international covenant, the International Commission of Jurists[2] (ICJ) says, Australia is entitled to derogate from civil and political rights only after it has declared a state of emergency in accordance with Article 4 of the covenant.

Judicial oversight

The Forum believes judicial oversight is crucial in ensuring that individual rights are safeguarded against abuse. In a paper prepared for the Public Interest Advocacy Centre, Joo-Cheong Tham[3], of the faculty of law at the University of Melbourne, says the proposed measures fall "short of providing effective judicial oversight" in relation to several aspects of control orders and preventative detention. Tham says that such oversight requires that the judicial officers enforcing it be sufficiently senior, but that the Bill fails this test. Furthermore, these powers on preventative detention and control orders are granted without "equality of arms" – that is equal access to information and representation – between the parties. Those against whom orders are granted, and their lawyers, do not even have to be given reasons for the issuing of the order. The preventative detention orders provide for executive warrants, with very limited rights of appeal.

Alastair Nicholson[4], a professorial fellow in the Criminology department at the University of Melbourne, has called the provision of judicial review within the Bill "no more than window-dressing". It is a "meaningless safeguard", he says, "because the judge or magistrate concerned has no way of testing what is produced by the authorities".

The Forum understands that state and territory leaders attending a special meeting of he Council of Australian Governments[5] regarded full judicial review as an important element and safeguard in the proposed Bill, yet these review processes appear to have been significantly weakened. One safety valve proposed was a sunset clause that would have meant certain sections of the legislation would have lapsed after several years. In the event, the sunset clause that is being proposed is one of 10 years. The Forum considers this to be manifestly too long, a view supported by the ACT Human Rights and Discrimination Commissioner and others.

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[2] International Commission of Jurists: Australian Section (7 Oct 2005). ICJ Australia opposes new counter-terrorism laws. www.ICJ-Aust.org.au

[3] Joo-Cheong Tham. (Oct 2005). Provisions of the Anti-Terrorism Bill 2005 (Cth): Dealing with Control and Preventative Detention Orders: The failure to provide effective oversight. Paper prepared for the Public Interest Advocacy Centre, Sydney.

[4] Alastair Nicholson (13 Oct 2005). Farewell to freedom. The Age. www.theage.com.au/news/opinion/...

[5] Council of Australian Governments' Communique: Special Meeting on Counter-Terrorism. 27 Sept 2005. http://www.coag.gov.au/meetings/270905/index.htm.

Defining terrorist organisations
In defining "terrorist organisations" in the ways that this Bill does, it separates terrorism from a range of serious criminal actions already well defined in law, such as murder, arson, assault and battery, trespass to the person, etc. Terrorism – the act of filling or overcoming others with terror, dominating or coercing them by intimidation – involves a range of serious criminal acts, all of them abhorrent and all of which can and should be dealt with according to existing criminal law. To set terrorism aside from other violent crime is contrary to logic. It also leaves individuals of certain ethnic origins vulnerable to vilification. The International Commission of Jurists says: "The alienation of certain minorities through these laws may in fact prove counterproductive in the long run."[6]

The ICJ says – and it is a view the Forum shares – "rather than being a measured response to terrorists, the proposed further laws hand victory to terrorists by undermining and irrevocably altering the very society they are designed to protect"[7].

Questions of constitutionality
Questions have been raised about the constitutionality of the Bill. This is a concern the Forum also shares. The ACT Human Rights and Discrimination Commissioner, Dr Watchirs[8], has advised the Chief Minister that "if this Bill, as currently drafted, were copied and enacted in the ACT it would contravene the *Human Rights Act 2004 ACT…* in a number of significant ways, particularly in regard to the rights to liberty, fair trial and privacy. Several measures, including preventative detention, which in the case of proposed ACT legislation would be extended from 2 to 14 days, enable the executive to bypass many ordinary criminal law procedures and protections to varying degrees."

Tham, in his paper for the Public Interest Advocacy Centre[9], says that poor judicial oversight of control and preventative detention orders "will increase the likelihood" that control and preventative detention orders will be unconstitutional.

More specific concerns about the legislation

Sedition
John Dowd, President of the Australian section of the International Commission of Jurists, has said the sedition laws proposed in the Bill abandon "the most fundamental

[6] International Commission of Jurists (7 Oct 2005). ICJ Australia opposes new counter-terrorism laws. www.ICJ-Aust.org.au
[7] ibid.
[8] Dr Helen Watchirs (19 Oct 2005). Letter to Chief Minister Jon Stanhope Re: Commonwealth Anti-Terrorism Bill 2005. www.hro.act.gov.au
[9] Joo-Cheong Tham. (Oct 2005). Provisions of the Anti-Terrorism Bill 2005 (Cth): Dealing with Control and Preventative Detention Orders: The failure to provide effective oversight. Paper prepared for the Public Interest Advocacy Centre, Sydney.

principles one would expect to be inviolable in a liberal democratic society"[10]. He goes on to say: "The protection of individual liberty, the freedom of thought and speech, the absence of guilt by association, and the right to quiet enjoyment of life are the keystones of our democracy."

It is this aspect of the proposed laws that poses the most fundamental threat to the rights of those who live in Australia. Despite reassurances from the Prime Minister and other senior Federal MPs, experience with asylum seekers and with mandatory detention laws demonstrate that mistakes do occur, and that without transparency in the system, people will be wrongfully charged.

Expanding the provisions relating to sedition, as now defined in the *Crimes Act 1914* and the *Criminal Code 1995*, and to introduce a new definition of "seditious intent" is excessive. A sedition offence with a penalty of three years' jail already exists, and it targets promotion of inter-communal violence. It is already an offence, punishable by life imprisonment, to threaten politically motivated violence with the intention of intimidating a section of the public. As Dr Watchirs points out in her advice to the ACT Chief Minister, "broadening the basis for prosecuting political speech as 'seditious' is a matter of grave concern in a liberal democracy"[11].

Members of our community who experienced life under Hitler fear for what these provisions may mean for freedom of speech and the liberal democratic process in this country, and it is not hard to see why they do so.

The International Commission of Jurists says: "The creation of sedition offences where one can go to jail for up to seven years if they 'urge disaffection against the government' is anathema to basic democratic principles."[12]

Control Orders

The proposed control orders would enable up to 12 months' house arrest, use of an electronic tracking device attached to a suspect, and broad limitations on where a suspect could go and who they could meet. The Asian Director of Human Rights Watch says that to permit such restrictions of the civil liberties of a detainee "when they have not even been charged are characteristic of dictatorship, not a democracy"[13].

The International Commission of Jurists is right when it says that "the imposition of such conditions [on those] who are merely suspects (rather than proved to have committed terrorist offences) is a radical law and order measure that has serious and real potential of ensnaring innocent people in the net. What is, in effect, punishment without conviction

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[10] The Hon. John Dowd (7 Oct 2005). ICJ Australia opposes new counter-terrorism laws. International Commission of Jurists, www.ICJ-Aust.org.au

[11] Dr Helen Watchirs (19 Oct 2005). Letter to Chief Minister Jon Stanhope Re: Commonwealth Anti-Terrorism Bill 2005. www.hro.act.gov.au, p.12

[12] International Commission of Jurists: Australian Section (17 Oct 2005). ICJ Australia denounces new counter-terrorism laws. Media Release. www.icj-aust.org.au

[13] Human Rights Watch (13 Oct 2005). Australia: Anti-terrorism proposal threatens civil liberties. www.hrw.org.

by any court, following an exercise in crystal ball gazing, is a serious departure from the rule of law and standards of justice we have come to value. Moreover, it has not been demonstrated that such orders would reduce the risk of terrorism."[14]

Senior Government Ministers have equated the control orders to apprehended violence orders. However, the restrictions imposed by clause 104.4 of the Bill are, as Dr Watchirs notes, "much more extensive than those available under current state and territory legislation governing AVOs. They infringe human rights under the International Convention of Civil and Political Rights"[15] in a number of ways, particularly under articles 12(1) relating to freedom of movement, article 17(1) relating to privacy and reputation, article 18 relating to freedom of religion, and article 22 relating to the right to association. Rights of access to information, freedom of expression and liberty are also restricted. Furthermore, the constraints on making of AVOs are less strenuous, and the rights of appeal are more onerous than are those associated with the proposed control orders.

That the proposed control orders are determined based on the balance of probabilities rather than on the more usual test of being beyond reasonable doubt represents another serious erosion of the individual's civil rights.

Preventative detention

Dr Watchirs has said that preventative detention without charge or trial is "inherently problematic in respecting human rights of detainees", particularly the right of the presumption of innocence under article 14(2) of the International Covenant on Civil and Political Rights. Dr Watchirs says the Human Rights Committee, which monitors compliance with the covenant, has made it clear that "the use of preventative 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, information on the reasons must be given, and court control of the detention must be available. The common law does not generally sanction preventative detention."[16]

These requirements are clearly not met in the Bill.

The right to legal representation would be curtailed by clause 105.34(1) of the Bill, and it appears that the right to independent legal representation may be fettered. Monitoring by a member of the Australian Federal Police of discussions with a lawyer are contrary to United Nations rules about a detainee's right to confidential access to a lawyer. As noted above, judicial review, essential in ensuring appropriate safeguards in the application of these laws, is limited. Neither a detainee nor his/her lawyer has access to information about the basis for the preventative detention order.

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[14] International Commission of Jurists (7 Oct 2005). ICJ Australia opposes new counter-terrorism laws. www.ICJ-Aust.org.au, p.2

[15] Dr Helen Watchirs (19 Oct 2005). Letter to Chief Minister Jon Stanhope Re: Commonwealth Anti-Terrorism Bill 2005. www.hro.act.gov.au, p.5.

[16] ibid, p.5.

The International Commission of Jurists has said that interrogation and other investigative techniques requiring 14 days to complete "creates an environment that introduces real risk of abuse. Imprisoning a person without charge for two weeks is not merely a practical measure designed to gather intelligence; it represents a step in a direction which abandons completely the fundamental principles that a person is innocent until proven guilty, and ought not be deprived of their liberty without conviction by a court."[17]

The provisions of the Bill allowing a detainee to contact a family member or employer to let them know of their safety, but not to explain where they are, why they are being held, or how they can be contacted is a draconian restriction of civil rights. Furthermore, these provisions are open to abuse by employers dissatisfied with the absence of employees.

Federal police use of force (shoot to kill)

While the use of lethal force has now been restricted to that already available to the Australian Federal Police, concerns remain because, as the case of Jean Charles de Mendezes in London demonstrates, fatal mistakes can occur. The existing provisions under the *Crimes Act 1914* apply only to persons arrested for an offence, whereas the Anti-Terrorism Bill applies these provisions to people who are the subject of a preventative detention order, with a much higher probability of innocence. Extending shoot to kill privileges in such cases elevates concerns about this provision.

Australian Federal Police notice to produce

We are also concerned that the new notice-to-produce provisions will remove both a suspect's right to silence and their right not to self-incriminate, further infringing basic human rights. The impact of these provisions on journalists, forcing them to reveal their sources and making it an offence not to give up documents on terrorism-related stories further erodes long-established democratic principles.

Failure to address prevention of torture

Dr Watchirs says that "prohibiting the acceptance, disclosure and use of material that is product of torture"[18] is an essential element missing from the Bill.

In July 2002 Ministers representing the 45 Member States of the Council of Europe unanimously adopted Guidelines within which the debate about counter-terrorism should be conducted. These Guidelines[19] (clause IV) make clear that "The use of torture or of inhumane or degrading treatment or punishment is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected or convicted of terrorist activities, irrespective of the nature of the acts that the

[17] International Commission of Jurists (7 Oct 2005). ICJ Australia opposes new counter-terrorism laws. www.ICJ-Aust.org.au, pp.2-3.
[18] Dr Helen Watchirs (19 Oct 2005). Letter to Chief Minister Jon Stanhope Re: Commonwealth Anti-Terrorism Bill 2005. www.hro.act.gov.au, p.2.
[19] Council of Europe (11 July 2002). Guidelines on human rights and the fight against terrorism.Directorate General of Human Rights, 804th Meeting of the Ministers' Deputies.

person is suspected of or for which he/she was convicted". The Bill fails to address these issues.

Given provisions for extended detention without trial and a lack of adequate judicial review, such provisions are critical in ensuring that human rights are protected.

Failure to provide protection for children

The Forum urges the Senate to ensure that all state and federal agencies dealing with counter-terrorism be required to have a protocol for protecting children caught in operational matters. This should take the form of an independent child protection officer who attends all raids. While it will not lessen the fear or trauma suffered by children caught in such actions, it will provide a greater guarantee that the best interest of the child is served and that excesses are curbed.

Experience over many years with Immigration Department Compliance raids has amply demonstrated the damage that can be caused to children placed in such traumatising situations. To be invaded in the "safe" environment of home – or worse - woken from sleep by strangers in dark uniforms with weapons and strong lights displaying shouting, aggressive attitude is, literally, a child's worst nightmare. Whatever small comfort can be provided to innocent family members by the presence of an officer with special training and responsibilities could ameliorate counter-productive behaviour by raiding officers and their targets alike.

Conclusion

We firmly believe – and our view is supported by eminent legal experts – that the Bill as presented is unnecessary and unacceptable. It greatly erodes fundamental human rights and civil liberties that Australians now enjoy, and in a way that is disproportionate to the threat of terrorism. This is especially so given that existing laws allow the authorities to take the actions needed to prevent terrorism and to prosecute those who perpetrate terrorist acts.

In the words attributed to the NSW Attorney-General The Hon. Bob Debus, the Federal Bill "started out as a Bill of which Adolf Hitler would be proud and now it's just a shithouse Bill"[20].

Dr Watchirs, the ACT Human Rights and Discrimination Commissioner, says: "National [and ACT] 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"[21]. It is a view with which we concur fully.

[20] The Hon. Bob Debus (Syd. Morning Herald 11 Nov 2005). Article reporting on the Minister's comments to Caucus.

[21] Dr Helen Watchirs (19 Oct 2005). Letter to Chief Minister Jon Stanhope Re: Commonwealth Anti-Terrorism Bill 2005. www.hro.act.gov.au, p.2.

We call upon the Government to withdraw this Bill and to focus on the appropriate use of existing powers to keep our nation safe from real threats of terrorism.

We would be happy to address the committee to elaborate on aspects of this submission.

Signed:

John Highfield	Anne Lanham
Convenor	Hon. Sec.
Manly Vale NSW	Manly NSW

11 November 2005

On behalf of the Northern Beaches Civil Rights Forum, Manly NSW