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Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
via email to: legcon.sen@aph.gov.au

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

Dear Secretary,

We welcome the opportunity to provide a submission to the Committee on the provisions of the *Anti-Terrorism Bill (No.2) 2005*.

The Uniting Church in Australia is committed to human security and the realisation of human rights. Far from being competing values, we believe that human security can only be assured by the protection of human rights.

On the occasion of the Church's inauguration in 1977, the National Assembly made a number of promises and affirmations, including the following:

> *We affirm our eagerness to uphold basic Christian values and principles, such as the importance of every human being, the need for integrity in public life, the proclamation of truth and justice, the rights for each citizen to participate in decision-making in the community, religious liberty and personal dignity, and a concern for the welfare of the whole human race.*
>
> *We pledge ourselves to seek the correction of injustices wherever they occur. We will work for the eradication of poverty and racism within our society and beyond … We will oppose all forms of discrimination which infringe basic rights and freedoms.*

In 1997, the Church invited Australia's leaders and citizens to join it in building a nation which:

> *stands firmly for human rights, even at cost to itself, as a responsible member of the international community.*

In 1988, Australia's Bicentennial Year, the Church issued a second *Statement to the Nation* in which it made the following statement:

> *We deplore the divisions of humanity along racial, cultural, political, economic, sexual and religious lines. In obedience to God, we struggle against all systems and attitudes which set person against person, group against group, or nation against nation.*

The Uniting Church has made such statements because, in the Christian tradition, we believe that all people are created in the image of God and should be treated accordingly. In our democratic society this understanding of humanity is found in the knowledge that all people are human and have inalienable rights that must be upheld. Christian beliefs share with the human rights tradition a concern for the well-being of all people, and also the compassion and care required to seek the fulfilment of that well-being. It is out of these commitments that we offer this submission on behalf of the Uniting Church in Australia.

We would welcome the opportunity to discuss our submission with the Committee should it be of any assistance. Please contact my assistant Jenny Bertalan on (02) 8267 4202 or jennyb@nat.uca.org.au in order to arrange a suitable time.

Yours sincerely,

Rev Dr Dean Drayton
President
Uniting Church in Australia

Introduction
Thank you for the opportunity to comment on the provisions of the *Anti-Terrorism Bill (No.2) 2005.* This is a very significant piece of legislation which impacts on the national security of the nation and on the human rights of people within its jurisdiction.

The Uniting Church is deeply concerned about a number of elements of the Bill. We believe these laws are neither necessary nor proportionate to the threat posed by terrorism. We also believe they may violate fundamental human rights including the presumption of innocence, freedom from executive detention, the right to a fair trial, the right to privacy, freedom of movement and freedom of speech (Byrnes, Charlesworth and McKinnon 2005).

Our specific concerns are detailed in the sections that follow.

Inadequate time to consider the Bill
We would first note the extremely brief time available to the Committee to consider this Bill, and the even shorter time available for public submissions. This process runs contrary to the established principles of open consideration and debate of the Parliament. It represents an apparent abrogation of the Senators' responsibilities to carefully scrutinise legislation put before them and suggests a lack of interest in public consideration of such significant legislation. No reasons of national security can be found for this haste, given that our threat level remains at 'medium'.

Some people have publicly argued that the recent arrests in Sydney and Melbourne on terrorism-related charges demonstrates the need to pass this legislation immediately. We believe the opposite is true: legislation of this magnitude requires calm consideration, free from the passions heightened in the last few days, in order to ensure that it represents good public policy and not lawmaking on the run.

No demonstration that existing laws are inadequate
Since September 2001, the Parliament has enacted no less than 28 pieces of legislation relating to national security. Many of these already give police and intelligence services extraordinary powers, such as the power of ASIO officers to detain and interrogate any person thought to have information pertaining to a terrorist act without the right to silence, even if the person is not themselves a suspect. On May 19, the then Director General of ASIO explicitly stated to a Senate Estimates Committee that the existing powers were adequate (Ramsay 2005).

The government has not demonstrated that existing measures are inadequate for meeting the threat of terrorism. Indeed, it does not even appear to have attempted this. No detailed explanations have been provided by the Prime Minister or the Attorney-General. The Director-General of ASIO did not provide any information to this effect to the Senate Estimates Committee last week. Indeed the most detailed explanation for the need for new laws appears to be a statement by the Prime Minister in September that the terrorist attack on London was "quite atmospherically changing, it really was … that had quite an effect on me" (quoted in Hartcher 2005). We do not consider this to be an adequate analysis of the ineffectiveness of existing laws and trust the Committee will seek specific answers in this regard.

No justification provided for the new laws
Furthermore, no explanation has been provided as to how these laws will address the sorts of legislative weaknesses apparently revealed by the London bombings. In fact, it appears none of these laws could have (or did) prevented that atrocity. In fact, as Hugh White recently pointed out, "the Government has not tried to explain to us exactly what the powers it is seeking are for, how they would contribute to the fight against terrorism, and why they are needed" (White 2005).

On the other hand, two statements by the Attorney General suggest strange motives. He has admitted on several occasions that the control orders are needed because of a lack of resources for surveillance by intelligence agencies (eg. Kearney and Kerin 2005). That we should be asked to forfeit fundamental civil liberties for economic reasons is alarming. He has also indicated that the new laws would target people who allegedly trained with terrorist organisations before they were proscribed (White 2005). This sounds like a type of retrospective lawmaking. Depriving a person of their liberty on the basis of something that was legal at the time has long been acknowledged in the common law as unacceptable.

Problems with specific provisions of the Bill

Schedule 1 - Definition of a terrorist organisation etc.
Schedule 1 adds a new ground for proscribing terrorist organisations under s 102.1(2) of the *Criminal Code* where an organisation 'advocates the doing of a terrorist act'.

We are concerned about the additional reference to 'advocating a terrorist act' by 'directly praising the doing of a terrorist act' (line 11). This appears to cover statements which may be seen to support or justify terrorism, even indirectly. For example, it is not clear if praising the anti-apartheid movement in South Africa might fall under the scope of this provision, given that some terrorist acts occurred as part of that struggle. Similar comments could be made about the colonists in the USA War of Independence. Given the lack of precision or agreement governing which historical acts constitute 'terrorism' (or even the legitimacy of some of them), we would welcome an improvement to the language to clarify this provision, or its removal.

Furthermore, we understand that this Schedule could lead to the banning of entire organisations on the basis of a statement by a single person held to be a representative, even if the organisation had no other involvement in terrorism, and even if the act of praise was not intended to cause further terrorism (Lynch, Saul and Williams 2005: 6). We do not consider it appropriate to collectively punish all members of an organisation for the sins of one.

Schedule 4 – Control orders and preventative detention orders
These provisions have been the most contentious in the public debate. We note the significant body of eminent legal opinion that, despite improvements in the drafting, both these measures continue to violate the human rights of suspects – most notably the freedom from arbitrary detention and the right to a fair trial (see for example Lasry and Eastman 2005; Watchirs 2005; Nicholson 2005).

Control orders can be ordered for up to one year (with the possibility of successive orders) where a court believes, on the balance of probabilities, that such an order will assist in preventing a terrorist act. We note that while significant improvements have been made to this provision in relation to judicial review, it remains true that the

defendant will not know the detail or evidence behind the reasons for the control order being sought. Without this information, the capacity to defend oneself is severely restricted. There is simply no way to have confidence that this process will not lead to unjust determinations.

Under the preventative detention provision, a person could be detained for successive periods of 14 days for up to ten years (longer if the sunset clause is removed before it takes effect), without ever having the opportunity to effectively test the evidence against him or her, on the balance of probabilities as determined by a judge acting 'in a personal capacity', who him/herself may not even be allowed access to the evidence. We note that these provisions are considered so odious that the Law Society of New South Wales has publicly called on members of the judiciary to boycott the process (Australian Broadcasting Corporation 2005).

Even those accused of terrorist activities deserve to have their human and legal rights recognised. In particular, the rights to presumption of innocence, habeas corpus and a fair trial must be preserved, because it is entirely possible the person is innocent, especially in the context of their use (as described by the Attorney General) when other charges cannot be laid due to a lack of evidence of criminal activity (Kearney and Kerin 2005).

The criminalisation of revealing one's whereabouts to one's own family is particularly disturbing as it undermines family relationships. Furthermore, if one is not able to tell others about one's detention, it is effectively impossible to seek legal redress for wrongful detention or avoid dismissal from employment.

Schedule 5
We note that this schedule includes a provision for warrants for non-terrorism related offences (cl 3ZQO). We do not believe it is appropriate for laws unrelated to terrorism to be included in this Bill. This appears to be lawmaking by stealth.

Schedule 7
We note that this schedule provides for amendments to two offences in separate Acts. Changes in the definition of 'sedition' (which applies to individuals) in the *Criminal Code* update the language, add grounds for sedition, and add a 'good faith defence'. Changes to the *Crimes Act 1914* relating to 'seditious intention' (which applies to associations of people) update the language of this provision.

We do not understand why there are separate references to 'sedition' and 'seditious intention' with different definitions and different defences. This seems to create inconsistency. We understand that the Gibbs Review recommended repeal of the provisions relating to 'seditious intention' altogether, and support that view (Lynch, Saul and Williams 2005: 16).

Much has been written about the proposed amendments to sedition offences. We understand considerable debate has already taken place within Parliament regarding this schedule. In relation to these matters, we wish to raise a few issues we have not yet seen presented in the debate.

The provision relating to 'sedition' includes a 'good faith defence' but the provision regarding 'seditious intention' does not. We believe there is no justification for this absence. It means that individuals can point to 'good faith' while associations of people cannot, which makes little sense.

Furthermore, the definition of 'seditious intention' includes "(c) to urge another person to attempt to procure a change, otherwise than by lawful means, to any matter established by law of the Commonwealth" (this is not new to the current Bill). We understand that this definition includes nonviolent civil disobedience as exemplified by religious and political leaders such as Mohandas Gandhi, Rev Dr Martin Luther King Jr, Archbishop Desmond Tutu, and a great many other prophets of history.

Nonviolent civil disobedience is not seditious. In fact, it represents the highest regard for the rule of law. It is a simple truth that from time to time, even western liberal democracies enact laws which are only later recognised as unjust (for example, suppression of peaceful protest in Queensland in the 1970s). Sometimes no amount of lawful activity is able to redress these injustices. Indeed there can be times in which the struggle for justice demands breaking the law in order to dramatise the injustice. But as Dr King wrote in his *Letter from Birmingham Jail* (1963):

> *"I submit that an individual who breaks a law that conscience tells him is unjust and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law."*

Given that the penalty for 'seditious intention' is the declaration of an 'unlawful association', which in turn carries penalties including imprisonment of one year for all officials, imprisonment of three months for all members, forfeiture of all property to the Commonwealth and censorship of all published materials (Part IIA of the *Crimes Act 1914),* we strongly urge the Parliament to repeal this provision, and preferably the entire section of the Act.

Sunset clauses and Review

We are concerned with the lack of ongoing review of this legislation, in contrast to the equivalent provisions in the United Kingdom (Michaelson 2005). We believe similar measures to provide ongoing independent monitoring of the implementation of these laws would improve public confidence that they are not being abused or misused. A 10-year sunset clause on only some provisions is not adequate.

We also note the unusual language surrounding the 5-year review of the legislation by COAG. This appears to be a record of a decision rather than a legislative mandate. The use of the article "if" in relation to a report being given to the Attorney General suggests that such a report might not be provided, which would clearly betray the commitment of COAG on September 27. We encourage the Committee to tighten the language of this provision to ensure that an open review process definitely takes place and a report is tabled in Parliament.

Constitutional questions

We understand a number of eminent lawyers have raised serious constitutional problems with this legislation (eg Lasry and Eastman 2005; Gagelar 2005). Aside from supporting our concern that the Bill has been too hastily drafted and debated, we are not qualified to comment on the technical merits of their arguments.

We do, however, wish to raise a deeper issue. The recent debate about the constitutionality of the Bill during the drafting phase with the States and Territories and subsequently has tended to focus on whether certain provisions of the Bill would survive a High Court challenge. It seems to us that this is an entirely inappropriate way to conduct the debate. As it stands, the Constitution is being treated as an

inconvenience to be overcome rather than something to be passionately defended for what it represents.

For example, the entire process of involving State and Territory governments in the preventative detention orders is to circumvent the Constitutional prohibition on executive detention. This clause is not a mere technicality but rather stands as a defence of the separation of the executive from the judiciary, which is itself an indivisible element of the rule of law. We believe that these processes should not just have the veneer of judicial review and that the executive should not appropriate to itself a judicial function which should rightly be left to the courts. That our governments appear to be seeking to manoeuvre around this protection is nothing to be proud about. This is not the proper business of the parliaments of Australia.

Terrorism and Human Rights

We do not believe it is either appropriate or necessary for Australia to defend itself from terrorist acts by violating human rights. We note in this context the recent resolution of the United Nations General Assembly "*Reaffirming* that all measures to counter terrorism must be in strict conformity with international law, including international human rights standards and obligations" (A/RES/59/195, agreed 20/12/2004).

We are fully cognizant of the threat to Australian lives posed by terrorism but do not believe it represents 'a public emergency threatening the life of the nation', which are the conditions laid down in the International Covenant on Civil and Political Rights for the suspension of (certain) human rights. We note that the Australian Government has given no indication of this emergency either, even though it is required to do so under international law to which it has bound itself.

While they hold no jurisdiction in this matter, it is worth considering the words of the Law Lords in relation to a recent case concerning the indefinite detention of non-citizen terrorist suspects. In his verdict which formed part of the majority, Lord Hoffman observed that

> *"Terrorist crime, serious as it is, does not threaten our institutions of government or our existence as a civil community … The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for parliament to decide whether to give the terrorists such a victory."* (*A v Home Secretary* (2004) UKHL 56 at [96-97])

In the context of the recent public debate about these proposed measures, two former Chief Justices of the High Court, two former Justices of the Federal Court, the ACT Human Rights Commissioner, the President of the Human Rights and Equal Opportunity Commission, the Law Council of Australia, the NSW Council of Civil Liberties and Liberty Victoria have all spoken publicly about the threat they pose to fundamental civil liberties and the rule of law. Despite considerable research, we have not found a single legal opinion that differs from this weight of collective opinion.

Defence of civil liberties is no idle matter, for they are the very foundation of democracy. The right to freedom from arbitrary detention under common law dates back to the Magna Carta. As stated by Lord Hope of Craighead at [100] in the

abovementioned House of Lords decision, “It is impossible ever to overstate the importance of the right to liberty in a democracy”.

Problems of abuse

It appears to us as if the legislation was framed under the assumption that specified officers (eg. of the Australian Federal Police and ASIO) will never seek to detain or control a person in error. The secrecy provisions are so tight they preclude journalists from reporting use of such powers even in the case of illegality, inhumane treatment or other abuses, for the duration of the detention (which can be continually renewed). In relation to these matters, the Hon Jon von Doussa (2005) recently remarked that

> *“The defining characteristic of a police state is that the police exercise power on behalf of the executive, and the conduct of the police cannot be effectively challenged through the justice system of the state. Regrettably this is exactly what the laws which are currently under debate will achieve.”*

As such, the ability of the public to have confidence in the legitimate exercise of these powers is in fact *undermined.* This is not conducive to the effective gathering of intelligence, and thus contradicts the objective of the legislation.

Worldwide experience is that without safeguards that preserve human rights, these sorts of powers are inevitably abused, even in western liberal democracies – for example South Africa under apartheid and the UK during the ‘Troubles’. In the last few years terrorist-related charges have been repeatedly used to suppress peaceful and legal dissent in the United Kingdom (Monbiot 2005). We invite the Committee to consider if there is a single example in world history in which the proposed powers have not been abused, and later regretted. We can think of none.

Furthermore, while Australia has an admirable record in comparison to most other nations, our history is full of examples of both accidental and deliberate abuse of policing, intelligence and detention powers. To provide just three examples out of many hundreds:

- Almost every state has in recent years learned of widespread police corruption
- Australians were especially alarmed to hear about the detention of Cornelia Rau and deportation of Vivian Alvarez Solon – not to mention the response of bureaucrats whose first priority appears to have been to cover up the error rather than address them. The Ombudsman has since indicated the possible wrongful detention up of to 220 others.
- Mr Bilal Daye was recently compensated for an ASIO raid of his premises without a warrant because they went to the wrong address

Conclusion

We urge the Committee to reflect deeply on this Bill and its implications for the future of this great nation. We believe it would be wise to extend the time available for this reflection due to the considerable significance of the changes it represents. The threat of terrorism must be handled carefully, with every opportunity given for wise heads to prevail.

We believe it is time for our nation to stop and think about where we should draw the line in our search for security. We all want to live with security. Terrorism represents

just one of a range of threats which include avian bird flu, climate change and nuclear weapons. But it is not appropriate for a democratic state to preserve national security at the expense of personal security.

The Uniting Church believes that the legislation takes Australia down a dangerous path. Numerous provisions of the Bill violate fundamental civil liberties that are the inheritance of centuries of common law and a core part of our social fabric. Far from 'getting the balance right', many of these laws threaten the very democratic values of our society that they aim to protect.

We therefore ask the Parliament to reject the elements of the legislation that violate human rights, and commit itself to the critical task of drafting new legislation that ensures security from terrorism while preserving the freedoms that define this nation.

Submission prepared by
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