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

Dear Committee

Human rights implications of the *Anti-Terrorism Bill* 2005

Thank you for the opportunity to make a submission to the inquiry into the *Anti-Terrorism Bill* (No 2) 2005. As you may be aware, we were asked by the ACT Chief Minister Jon Stanhope to consider the human rights implications of preventative detention and control order provisions in an earlier version of the draft legislation. On 18 October 2005 we provided preliminary advice in relation to the human rights implications of that draft.

There have been a number of amendments to the Bill since that time, in response to concerns raised by State governments and members of the federal government. We welcome those changes that have improved the safeguards against abuse of these significant powers. However, some of the amendments in fact weaken human rights protections within the Bill. Overall, we consider that the Bill remains disproportionate in its impact on individual human rights and that it breaches Australia's international human rights obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC).

We have summarized our key concerns with the Bill, and have then addressed these issues in more detail below. Because of time constraints, we have confined this submission to the preventative detention orders and control orders regimes. This does not indicate support for other provisions, such as the sedition laws, which also contain significant restrictions on human rights.

1. Summary of Key Concerns

(a) General Issues

i. There has been no attempt by the Commonwealth government to justify the need for these specific provisions, and the severe restrictions on individuals' human rights, as required by the ICCPR. In these circumstances it is extremely difficult to be satisfied that these provisions are proportionate to the threat faced, particularly when the general level of alert issued by the government remains unchanged at 'medium.'

ii. The Bill contains no explicit reference to the need for decision-makers to interpret provisions consistently with human rights obligations. Unlike the United Kingdom, in Australia human rights are not protected by a bill of rights, and thus must be specifically incorporated into domestic legislation.

iii. The definition of a 'terrorist act' is broad, and includes the threat to commit a terrorist act. In conjunction with the widely drawn nexus in the preventative detention order and control order regimes, people may be detained without substantive proof of involvement in a terrorist plan, or in relation to acts that do not satisfy the generally understood meaning of terrorism.

iv. It is inappropriate that the safeguards of a criminal trial which are provided to people charged with a terrorist offence are far greater than the safeguards given to people against whom there is insufficient evidence for prosecution. Given that the sanctions imposed by control orders and preventative detention are significant, and in some cases approach the punishments imposed on convicted criminals, these orders should be subject to criminal standards of proof, and other protections.

(b) Preventative Detention Provisions:

We consider that the preventative detention order regime breaches the human right to be free from arbitrary detention under article 9 of the ICCPR, the right to a fair trial under article 14 of the ICCPR , the right of accused persons to be detained separately from convicted criminals and for children to be detained separately from adults under article 10 of the ICCPR, and for children to be detained only as a last resort under article 37 of the CRC.

In particular:

i. The regime still provides for detention without a judicial hearing and thus could be considered as allowing arbitrary detention in breach of article 9 (1) of the ICCPR. This defect has been exacerbated by the broadening of the categories of issuing authority now extended to retired judges, whose decisions may not be subject to judicial review under section 39B(1) of the *Judiciary Act 1903* (Cth).

ii. Judicial review of the preventative detention regime is inadequate. Although the Bill now provides for merits review by the Administrative Appeals Tribunal, this is not

judicial review, and may only occur once the detention is over. There is inequality in relation to the rights to apply to the courts for a remedy, with people who have been detained under Commonwealth law, and subsequently detained under State or Territory law, unable to apply to the State or Territory courts for review until the period of detention is completed, in breach of article 9 (4) of the ICCPR.

iii. There is no guarantee that the person subject to preventative detention will be told the reasons for their arrest and detention as required by article 9 (2) of the ICCPR, as information is not required to be provided if the police decide that this is likely to prejudice national security.

iv. Detainees are to be held almost incommunicado, with severe restrictions upon communications with family and others and draconian penalties for disclosure about the detention. These do not appear to be proportionate restrictions of freedom of expression under article 19 of the ICCPR.

v. Communications by the detainee with their lawyers are restricted and monitored, which may impair the detainee's right to a fair trial under article 14 of the ICCPR. Overheard information may lead police to follow up lines of inquiry that may assist criminal prosecution of the detainee.

vi. Detainees who are not charged with any criminal offence may now be held in prisons and remand centres, contrary to article 10(2)(a) of the ICCPR, with no exceptions being made for children under 18, who may be held with adult prisoners in breach of article 10(2)(b) of the ICCPR and article 37 of the CRC.

vii. There is no requirement that children be detained only as a last resort, in breach of article 37 of the CRC There is also no obligation upon police to make inquiries about the age of a child to ensure that a child is 16 years old. The onus is effectively placed upon a younger child to satisfy the police on reasonable grounds that they are under 16.

(c) Control Orders

The control order regime has been significantly improved by the introduction of a two-stage process, with the initial orders that are made *ex parte* only operating on an interim basis, and requiring confirmation at an *inter partes* hearing. However, we consider that the control order regime as a whole still has a disproportionate impact upon the right to be free from arbitrary detention under article 9 of the ICCPR and to a fair trial under article 14 of the ICCPR. The terms of the control orders may breach a range of human rights including freedom of movement (article12 ICCPR), communication (article 19 ICCPR), association (article 22 ICCPR) and to privacy and family life (article17 ICCPR).

In particular

i. It should not be sufficient grounds for a control order that a person has trained with a terrorist organization, if making the order would not substantially assist in preventing a terrorist act. This provision allows a control order to be made in respect of a person who poses no current risk of terrorism, on the basis of behaviour that may not have been prohibited when they engaged in it. To the extent that the terms of a control order amount to a penal sanction under article14 of the ICCPR, this may offend the prohibition on retrospective offences under article 15 of the ICCPR.

ii. It is disproportionate to impose a mandatory requirement that the first hearing of a control order application be *ex parte*. It would be appropriate for the court to have discretion to allow the person subject to the order to attend the initial application, where this would not defeat the purpose of the order.

iii. There is no time limit on the duration of the interim order, which adds to the potentially arbitrary nature of these measures. The minimal notice required to be given to a person about the confirmation hearing adds to the difficulty of preparing a case, and obtaining access to the evidence against them, which may breach the right to a fair trial under article 14 of the ICCPR.

iv. There is a clear inequality in the rights given to the Public Interest Monitor of Queensland to appear and provide representation for Queensland residents in hearings to confirm control orders, where there is no such support for residents of other States. HREOC or the Commonwealth Ombudsman should be given this power in relation to all Australians.

v. The ability to make successive control orders for an indefinite period adds to the punitive quality of these orders, and increases the likelihood that control order hearings would be considered to be criminal proceedings under the ICCPR, and thus requiring much greater protections. At a minimum, the interests of the person subject to the order should be given greater consideration where successive orders are contemplated.

These issues are considered in more detail below.

2. General Issues

(a) Justification for the Laws

Under the ICCPR there is a clear onus on government to justify limitations on fundamental rights; the more important the rights and the greater the intrusions, the higher the burden on government of demonstrating that the limitations are justifiable. While there are various formulations of the appropriate test for justifiable limitations, human rights jurisprudence requires that the Commonwealth government demonstrate that the proposed measures are:

- Adopted in pursuit of a legitimate objective (not in dispute here)
- Necessary for the achievement of that purpose, that is, they must

    - be rationally connected to the achievement of the objective
    - be proportionate
    - minimally impair fundamental rights
- Subject to adequate safeguards to avoid any abuse of the powers granted.

So far as the public discussion goes, the Commonwealth government has not as yet addressed a number of these matters in any detail. It has resorted to general assertions of the necessity for these laws (which in many respects are copies of the United Kingdom legislation), and of their consistency with human rights. While we understand that confidential briefings on some aspects of these questions have been given to the Premiers and Chief Ministers, it is not apparent that the breaches of human rights by the proposed laws can be justified by the current level of the terrorist threat in Australia, particularly in view of the strong powers available under existing legislation.

(b) Incorporation of International Human Rights Standards

Although the Commonwealth government has attempted to justify the 'unusual' provisions of the bill by comparisons to similar powers in the United Kingdom, this fails to acknowledge the important role of the UK *Human Rights Act*, which gives the judiciary the power to modify potential excesses of draconian legislation, by interpreting anti-terrorism provisions consistently with the European Convention on Human Rights. By contrast, Australia has no national bill of rights, and the Constitution contains very limited protections for human rights, and does not incorporate Australia's international human rights obligations.[1]

Accordingly, human rights norms are only enforceable where reflected in domestic legislation. We note that there is no reference in the Bill to the general principle that restrictions on rights be read in accordance with Australia's obligations under the ICCPR (and other human rights treaties), and that any restrictions on the exercise of ICCPR rights need to fall within the permissible restrictions set out in the ICCPR. If the Bill is intended to be consistent with human rights, this should be included as either an overriding principle or as an explicit factor that courts or issuing authorities or law enforcement agencies should be obliged to take into account in exercising powers and taking decisions under the legislation.

(c) Broad definition of Terrorist Act

The activating requirement in many of the provisions of the Bill is a connection to a 'terrorist act'. While such a requirement sounds reassuring, it is necessary to bear in mind the very broad current definition of a 'terrorist act' under section 100.1 of the *Criminal Code* which includes a mere threat to act, and can relate to actions that are not necessarily violent, such as the severe disruption of electronic systems. It is notable that terrorist acts need not be targeted at Australia, or at Australian citizens or interests, as the definition also encompasses to acts directed towards governments overseas. The term 'terrorist act' may thus include acts by resistance movements against despotic and oppressive regimes.

[1] *Al-Kateb v Godwin* (2004) 208 ALR 124.

Further, control order and preventative detention orders do not require actual proof of involvement in a terrorist act. Preventative detention orders for example only require that the police suspect, on reasonable grounds, that the person will engage in a terrorist act (which, for example could mean that police reasonably suspect that a person will make a threat, even though they may have no intention to carry it out). When the broad definition of the term 'terrorist act' is considered, it is clear that the provisions are extremely far-reaching and could encompass behaviour that does not fall within the generally understood concept of terrorism.

(d) Lack of criminal law safeguards

It is inappropriate for people who are not suspected of any crime, and who face detention and other draconian sanctions, to have fewer procedural rights than those who have been charged with engaging in a terrorist act. In prosecuting a person for a terrorist offence, police must have gathered sufficiently probative evidence, in a form acceptable to the court, to prove a case beyond reasonable doubt. Those charged with criminal offences have rights to see the evidence which will be brought against them, to be represented at their trial, and to be given reasons for any judgment made in relation to them (subject to determinations made by a judge under the *National Security Information (Criminal and Civil Procedures) Act* 2004. By contrast, when police seek a control order or detention order, which may result in detention for up to 14 days in prison, or a year under home detention (and subject to successive orders), the onus of proof is only on the balance of probabilities, and none of the criminal law protections apply.

3. The Preventative Detention Order Regime

Preventative detention of people who have not committed any offence is a serious encroachment upon fundamental human rights, including the right to liberty and the presumption of innocence, principles both of Australian common law and international human rights law.

However, if such a regime is considered essential to combat terrorism, robust safeguards for the rights of those detained will be critical to ensure that the laws conform to the principle of proportionality and to avoid the legalisation of a system of arbitrary detention. Since in nearly all cases a detained person will not be able to challenge his or her detention and obtain a remedy from an external body before any period of preventative detention is over, the building-in of adequate safeguards *before* any detention order is made is of great importance.

The international standard on detention

Article 9 of the ICCPR states:

1. Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of the charges against him.

The United Nations Human Rights Committee, in its General Comment on article 9 has stated:[2]

> [I]f so-called preventive detention is used, for reasons of public security, it … must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9(2) and (3), as well as article 14, must also be granted.

The Committee has interpreted the notion of arbitrariness in article 9 of the ICCPR as "not to be equated with 'against the law', but [it] must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability."[3]

(a) Preventative Detention Orders issued by the executive

The new Division 105 of the Commonwealth Criminal Code introduced by the Bill[4] sets out two types of preventative detention orders ("initial preventative detention orders" and "continuing preventative detention orders")

Initial preventative detention orders may be granted by a senior member of the Australian Federal Police (AFP)[5] and they may be extended or further extended[6] (the Bill sets a maximum period of 24 hours but the States and Territories have agreed to legislate to allow for a longer maximum period for initial detention). *Continued* preventative detention orders may be granted by a federal judge or magistrate, and now also by a judge of a State or Territory, a retired judge or a president or deputy president of the AAT.[7] Continued preventative detention orders may be made in respect of a person who is the subject of an initial preventative detention order and may also be extended and further extended[8] (the Bill sets a maximum period of 48 hours for such orders but the States and Territories have similarly agreed to legislate to allow for a longer maximum period of 14 days for continued detention).

Provisions of the earlier draft bill that gave powers to currently serving judges to grant continued preventative detention orders *ex parte* were objectionable as they provided only a façade of judicial involvement. Rather than curing this defect by ensuring that preventative

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[2] General Comment No. 8, para.4 (1982).
[3] *Van Alphen v The Netherlands*, Comm No 305/1988, para 6.3
[4] Schedule 4.
[5] cl 101.1 and 105.8
[6] s105.10
[7] s105.2
[8] s105.14

detention orders be made by the judiciary as a valid exercise of judicial power (which would require further procedural safeguards, such as a full *inter partes* hearing and a stricter onus of proof), the latest draft moves the process further away from the judiciary, by including retired judges and members of the AAT in clause 105.2. This is clearly an attempt to cure a breach of the constitutional separation of powers doctrine.

We consider that the current provision is an unsatisfactory half-way house, which does not provide proper judicial oversight, and seems likely to remain objectionable on constitutional grounds, as it still includes currently serving federal judges. In our view, to comply with article 9 of the ICCPR and avoid arbitrary detention, a full judicial process should be provided for continued preventative detention orders. However, if the process is not restructured as an exercise of judicial power, then the exercise of executive power should be subject to full judicial review under the *Administrative Decisions (Judicial Review) Act* 1977 both as to the legality and on the merits.

We note concerns that the inclusion of retired judges and State and Territory judges may be problematic because they may not satisfy the definition of "Officer of the Commonwealth", so as to be subject to review by the Federal Court under s39B of the Judiciary Act.[9]

(b) Judicial Review

Article 9(4) of the ICCPR provides that:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Article 14 of the ICCPR also provides for the right of access to court in the determination of one's rights and obligations in a suit at law.

There are clearly some improvements in the current bill, with the addition of a right to seek merits review by the AAT, and to be awarded compensation if the AAT would have overturned the decision to detain the person. However, this action can only be taken after the preventative detention order has expired and is review by a tribunal rather than a court. It is not clear why proceedings should not be able to be initiated immediately in the AAT where the merits of the decision are questionable, which might avoid a further period of detention.

It is also unclear why there should be different regimes for review by the federal courts and the State and Territory courts. Under clause 105.51 people detained under the Commonwealth law can apply to the federal courts for a remedy. The explanatory memorandum notes that injunctive relief could be sought, presumably under the jurisdiction of the courts conferred by s39B of the *Judiciary Act*. This is clearly not judicial review of the merits of the decision, only of its technical lawfulness, but at least it is able to be initiated while the person is in detention. If a person is subsequently detained under State and

[9] See the further advice of Lex Lasry and Kate Eastman attached to Jon Stanhope's media release of 1 November 2005, headed 'Bill still fails the Human Rights Acid Test', at 4.3

Territory preventative detention laws, they cannot seek such a remedy from a State or Territory court until the detention is over. It seems unlikely that the federal courts could provide any remedy to a person who is detained under State laws. The period of detention under State or Territory laws will be much longer than that in federal detention, but it appears that a person at this stage is effectively deprived of any means of seeking immediate review of their detention required by article 9 (4) of the ICCPR.

(c) Right to know the reasons for detention

Article 9(2) of the ICCPR provides that a person has the right to be informed of the reasons for their arrest, at the time of the arrest. Clause 105.32 of the bill provides that a person must be given a summary of the grounds on which the order is made. However, information is not required to be included in the summary if its disclosure is likely to prejudice national security. In circumstances where the person is being detained for alleged connections with terrorism it would seem likely that most relevant information might be deemed by the AFP to be prejudicial, so that summaries may contain little substance.

(d) Restrictions on communication

The preventative detention order regime severely limits the communication of the detained person, and those who are aware of their detention. Article 19 of the ICCPR protects the right to freedom of expression which includes "freedom to seek, receive and impart information of all kinds". This right may be restricted to protect national security, but it must be established that the restriction is strictly necessary to achieve this purpose.

The prohibitions on the detainee from disclosing the fact of detention, with a penalty of five years' imprisonment, effectively amount to keeping the detainee incommunicado. This is a disproportionate response, as it does not reflect an assessment of the risk to security in individual cases. The limits on the people whom the detainee can contact (but only to say that they are 'safe') appear arbitrary. If it is safe for the detainee to contact one family member, why can not they contact more than one? While we accept the need for tight controls on communication in such circumstances, it would be more appropriate for police to tailor prohibited contact orders to suit the security risk.

The penalty of five years' imprisonment under clause 105.41 for other people communicating information about the detention is draconian. We welcome the new exemption for communication between parents of a child in detention where both parents have had contact with the child. However, where a detainee is eighteen or older, one parent still faces imprisonment for informing the other of the detention. These provisions are based on a deeply unrealistic view of familial relationships, and criminalise the most natural of human behaviour. We note that there is currently no requirement upon police to warn those who are contacted of the risks they face, so that it is possible that people will breach these provisions unknowingly.

(e) Restrictions on access to legal advice

The Bill allows a detained person to contact a lawyer,[10] subject to any prohibited contact order, but all communications with the lawyer will be monitored by the AFP.[11] This provision breaches the right to legal assistance in criminal matters set out in article 14(3) of the ICCPR. The lawyer is in turn prohibited from disclosing to any other person the fact that a preventative detention order has been made, unless it is in the context of court proceedings or a complaint to the Ombudsman. While we note that the Bill purports not to affect the law relating to legal professional privilege,[12] it is hard to see how this general reference does anything to protect the confidentiality of lawyer-client communications while a person is being detained, given the monitoring proposed. Although such conversations can not be used in evidence, it is difficult to believe that police would not follow up lines of inquiry which are suggested by information disclosed in such monitored conversations.

We also note that a prohibited contact order may be made in respect of the detainee's lawyer, where the issuing authority is satisfied simply that this "*would assist in achieving the objectives of the preventative detention order*."[13] In such cases the AFP must assist the person to choose another lawyer, and may prioritise security-cleared lawyers.[14]

(f) Adults and Children to be detained in prisons

Another of the regressive changes in the latest draft of the bill is the addition of clause 105.27 which specifically authorizes a person subject to a preventative detention order to be held in a prison or a remand centre. Article 10(1) of the ICCPR provides that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the person." Although this requirement is acknowledged in clause105.53 of the bill, the ability to keep detainees in a prison directly undermines this provision, as the prison environment is notoriously violent and abusive. Further, article 10 (2) (a) of the ICCPR provides that "accused persons should, save in exceptional circumstances be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons". Although Australia has declared a reservation in relation to this article, it has accepted the principle of segregation as an objective to be achieved progressively. Segregation of people in preventative detention should be given priority in the implementation of this principle as they are not accused of committing any crime.

Finally, and possibly of most concern, clause 105.27 would allow children of sixteen and seventeen, who have not been accused of any crime, to be held in adult prison, in breach of article 10 (2) of the ICCPR which requires that "accused juvenile persons shall be separated from adults" which is also a requirement of article 37 of the CRC. This right recognises that children are particularly vulnerable to violence and abuse by other prisoners, and require much greater protection than adults. Australia has accepted that children serving sentences for criminal offences should be segregated from adults to the extent that it is the feasible and consistent with the obligation that children be able to maintain contact with their families,

[10] cl105.37
[11] cl105.38
[12] cl 105.50
[13] cl105.40
[14] cl105.37(3)

having regard to the geography and demography of Australia. In the case of preventative detention, there can be no justification for incarceration of children in adult prisons.

This section should be amended to ensure that as a minimum, adult detainees may only be held in remand centres, and children should not be detained in any adult prison or remand facility.

(f) Children should only be detained as a last resort

Under article 37 of the CRC, children should only ever be detained as a matter of last resort. However, this requirement is not reflected in the criteria for the making of a preventative detention order in clause 105.4, which makes no reference to the special considerations where the person is a child under 18. To satisfy article 37, the issuing authority must take the age of the detainee into account, and should be authorized to make a preventative detention order against a child only if there is no other alternative.

We also note with concern that although clause 105.5 provides that a preventative detention order cannot be made against a child under 16, there is no obligation upon police to make appropriate enquiries to verify the age of a child who is being detained. Under 105.5(2), a police officer need only take action to release a child from detention if the police officer is satisfied on reasonable grounds that the person is under 16 years of age. Under this section, it is conceivable that a police officer could decide that a mere statement by the detainee about his or her age did not amount to reasonable grounds, and would then have no obligation to make further enquiries. This effectively puts the onus upon a child in detention to adduce evidence to satisfy police of their age, where such information should be ascertained by police.

3. The Control Order Regime

The regime for control orders also imposes very significant restrictions on the liberty of those subject to the orders, and could in extreme cases amount to a form of house arrest. Unlike preventative detention orders, which are of limited duration, control orders may be made for up to 12 months, and successive orders may be made against the same person. Depending on the particular restrictions imposed and the length of time for which they are imposed, control orders could significantly affect a range of internationally guaranteed fundamental rights and freedoms including the:

- Right to liberty and security of the person and the right to be free from arbitrary detention (ICCPR, article 9)
- Right to privacy and respect for family life (ICCPR, article 17)
- Freedom of association (ICCPR, article 22)
- Freedom of expression (ICCPR, article 19)
- Freedom of movement (ICCPR, article 12)
- Right to work (International Covenant on Economic, Social and Cultural Rights, article 7)
- Freedom of religion (ICCPR, article 18)

- Right to health (ICESCR, article 12)
- Right to a fair and public hearing in the determination of one's rights and obligations in a suit at law or in the determination of a criminal charge (ICCPR, article 14),

as well as other rights, depending on the facts of a particular case.

While there have been some improvements in the safeguards for control orders, particularly in the introduction of *inter partes* hearings to confirm the orders, in our view the regime remains disproportionate in its impact upon these human rights.

(a) Grounds for making a control order

The grounds for issuing an interim control order under clause 104.4 and confirming it under clause 104.14(c) are that either the making of the order would substantially assist in preventing a terrorist act, or that the person has provided training to, or received training from, a listed terrorist organization. Accordingly, an order can be made on the basis that a person has trained with a listed terrorist organization at any time in the past, even though it may not substantially assist in preventing a terrorist act.

Although the court must then consider under clause 104.14(d) whether each of the terms requested by the police is reasonably necessary, appropriate and adapted for the purpose of protecting the public from a terrorist act (apparently to give some appearance of proportionality), it seems that this will simply affect the nature and strength of the restrictions, and that there is a presumption as a result of sub clause (c) that some form of order is appropriate where a person has trained with a terrorist organization.

It is notable that there is no apparent requirement that the organization should have been a listed terrorist organization at the time the person provided or undertook the training, and thus the provision imposes a penalty for doing something which may have been lawful at the time. This offends the spirit of article 15 of the ICCPR, which prohibits retrospective criminal offences.

(b) Mandatory *ex parte* interim orders

While it is an improvement for *ex parte* control orders to only operate on an interim basis, it is questionable whether it is proportionate to mandate that the first hearing be *ex parte*. We note that the United Kingdom Parliament's Joint Committee on Human Rights, in its report on the *Prevention of Terrorism Bill* 2005, stated in relation to interim *ex parte* orders:

> We accept that there should be the facility to make an *ex parte* application in an appropriate case, for example where there is a legitimate fear of disappearance or in other circumstances where the purpose of the application will be defeated if it is made on notice to the person concerned. In the absence of such concern, however, we see no reason why the hearing should not be *inter partes*.[15]

[15] United Kingdom Joint Committee on Human Rights, Tenth Report, 2 March 2005 at p4

As is currently done for domestic violence orders, an interim order could be made at an *inter partes* application (unless there is good reason to make an *ex parte* application), and then a date set for a final *inter partes* hearing to confirm the orders.

(c) Timing of Confirmation hearings and availability of evidence

It is also inappropriate that clause 104.5 should give the court complete discretion as to the day on which the parties should come back for a confirmation hearing, without hearing from the person affected. As well as the danger that the period of the interim order may be onerously long, there is also the possibility that it may be too short to allow the person to prepare for the hearing. It is notable that clause 104.12 requires only that the order and a summary of the grounds of the order be served upon the person at least 48 hours before the confirmation hearing. This is unlikely to give the person sufficient time to find legal representation and to adequately prepare their case.

It would be more appropriate that the date be set for an *inter partes* mention of the matter within a limited time (for example seven days) after the *ex parte* hearing, where arrangements can then be made for a full hearing date, and directions given in respect of evidence.

The lack of access to evidence may also cause difficulties in the preparation for the hearing. In clear contrast to criminal proceedings, where a brief of all evidence must be served by police upon the defendant in advance of the hearing, a person subject to a control order has no such rights. Clause 104.13 makes it clear that the person's lawyer is not entitled to be given any document other than the control order and a summary of the grounds for the order, which will exclude any information likely to prejudice national security.

Although it may be possible to seek information by subpoena or notice to produce, this will depend on the period of notice given the person subject to the order, and the effect of the *National Security Information (Criminal and Civil Proceedings) Act*.

(d) Legal assistance and the role of the Queensland Public Interest Monitor

The bill provides a special role for the Queensland Public Interest Monitor in relation to people who are residents of that State. Under clause 104.12, the Queensland Public Interest Monitor must be given notice of any interim control order, and under104.14, the Queensland Public Interest Monitor has the right to appear as a party in the confirmation hearing, and to represent the person.

It is patently unfair to provide more favourable conditions to Queenslanders than to those of any other State or Territory. All Australians should be treated equally under this legislation. This could be done by providing the same role for the Commonwealth Ombudsman or for the Human Rights and Equal Opportunity Commissioner in relation to citizens from other States and Territories.

Furthermore, given the inequality of arms between the parties, and the difficulties involved in challenging a control order, article 14(1) of the ICCPR arguably requires that persons seeking to challenge *ex parte* control order should receive legal assistance funded by the Commonwealth.

(e) Renewal of Control Orders

Clause 104.16(2) allows for successive control orders to be made be made in relation to the same person. There is no limit to the number of time a person may be subject to a control order in relation to the same facts, such as having once trained with a terrorist organisation.

It may be appropriate to impose a higher standard for the renewal or further renewal of any control order, or at least to give greater priority to the interests of the person who may be subject to the order. The more often an order is renewed, the more likely it would be viewed as a criminal charge or penalty under the ICCPR, requiring the full panoply of procedural rights applicable to a criminal charge. None of these are specifically provided for in the Bill.

Please do not hesitate to contact us if we can be of further assistance.

Yours sincerely

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