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SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL COMMITTEE INQUIRY INTO THE PROVISIONS OF THE ANTI-TERRORISM BILL (NO. 2) 2005

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1 Introduction

This submission is made pursuant to the Senate Legal and Constitutional Committee Inquiry into the provisions of the Anti-Terrorism Bill (No. 2) 2005 (**'the Bill'**). This submission addresses a number of provisions of the Bill that we consider transgress Australia's human rights obligations.

At the outset we wish to express our concern over the lack of adequate opportunity for scrutiny of such an important and lengthy piece of legislation. The President of the Human Rights and Equal Opportunity Commission, John von Doussa QC, has noted that, by way of comparison, the 2002 Bill was the subject of three separate Parliamentary inquiries and was considered by Parliament over a 12-month period.[1] In our view the Committee should include in its report a recommendation for an equally comprehensive political and public debate over this Bill.

2 Summary

As a result of the Bill's rapid passage through Parliament and the limited window for submissions we have been unable to prepare a comprehensive review of the human rights implications of the Bill. We have briefly analysed the following issues:

(i) control orders;
(ii) preventative detention orders;
(iii) impact on effective legal representation;
(iv) curtailment of effective legal remedies; and

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[1] Press Release, 'Less haste and more scrutiny needed for anti-terrorism legislation – our human rights depend on it', Human Rights and Equal Opportunity Commission, 14 October 2005, available at <www.hreoc.gov.au/media_releases/2005/47_05.html>

(v) the lack of a reporting or review mechanism.

We are also troubled by the sedition offences introduced by the Bill but have had insufficient time to respond to this issue. A list of our recommendations to the Committee is set out in our conclusion in section 7 below.

3 Control orders

Division 104 of Schedule 4 of the Bill allows for the imposition of interim and confirmed control orders. An extremely wide range of obligations may be imposed under control orders, including house arrest and a requirement to wear a tracking device. Such orders amount to a significant interference with the right to liberty.

The right to liberty is protected by Article 9 of the *International Covenant on Civil and Political Rights* (**'ICCPR'**), which is, in part, incorporated into domestic law through the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). Article 9(1) provides, inter alia, "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

We have eight principal concerns about the regime of control orders. First, it is a violation of principles of natural justice and procedural fairness to allow a court to impose an interim control order without giving the person concerned an opportunity to make submissions and present a defence (104.4). The Joint Committee on Human Rights has criticised the lack of an adversarial procedure before control orders are imposed in the context of the anti-terrorism legislation passed in the United Kingdom.[2] In the absence of urgency (a scenario governed by 104.6-104.11) we do not feel there is any reason why an *inter partes* hearing should not be held *before* an interim control order is imposed.

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[2] Joint Committee on Human Rights, Prevention of Terrorism Bill, Tenth Report of Session 2005-5, available at <www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/68/68.pdf>.

Second, although an issuing court making an interim control order must specify a date on which the control order may be confirmed, the Bill does not impose a time limitation after which the interim control order will expire. In our submission this is an unwarranted interference with the right to liberty, and in particular with Article 9(4) of the ICCPR, which 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 court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

Third, the Bill provides that where the information is likely to prejudice national security, a person is not entitled to know the grounds on which the control order has been varied (104.26(2)). This is a most serious denial of natural justice and procedural fairness.

Fourth, the standard of proof for the imposition of interim control orders is the balance of probabilities (104.4(1)(c)). This is an unacceptably low threshold for the activation of powers to impose house arrest or the requirement to wear a tracking device, even temporarily. The appropriate standard of proof for the denial of liberty is that applied in the criminal courts; namely, beyond reasonable doubt.

Fifth, the test for imposing an interim control order of "substantially assist in preventing a terrorist act" (104.4(1)(c)) is insufficiently precise to avoid being arbitrary (see the commentary to the ICCPR by Professor Manfred Nowak, *The UN Covenant on Civil and Political Rights: CCPR Commentary*" (N.P. Engel, 1993) at 172 [29]).

Sixth, it is inappropriate for the breach of a control order to be classified as a criminal offence, punishable by 5 years imprisonment (104.27). Unless the breach of the control order relates, in some way, to the preparation or commission of a terrorist act, no criminal sanction should be imposed.

Finally, the sunset provision of 10 years (104.32) is manifestly excessive. Legislation passed in the United Kingdom giving the power to impose control orders has a sunset period of 12 months.[3] We urge the Committee to recommend that Parliament reduce the sunset provision to a similar duration.

4 Preventative detention orders

Division 105 of Schedule 4 of the Bill provides for preventative detention orders, which allow a person to be taken into custody and detained for a period without any charge being made, for the purpose of preventing an imminent terrorist attack occurring or to preserve evidence of or relating to a recent terrorist attack. Detention in the absence of a charge raises serious concerns about adequate safeguards for the protection of individual rights.

As noted above, at international law Australia has committed to respect human rights through ratification of the ICCPR. Relevantly, article 9(1) of the ICCPR prohibits arbitrary arrest and detention. This prohibition was affirmed by the International Court of Justice in the *Tehran Hostages Case* ((1980) ICJ Reports 3 at paragraph 91), which noted that arbitrary detention was contrary to the principles of the Charter of the United Nations and the fundamental principles of the Universal Declaration on Human Rights.

Detention may be arbitrary even where it is consistent with domestic law, because the notion of arbitrary detention incorporates elements of "inappropriateness, injustice and lack of predictability" (see the commentary to the ICCPR by Professor Manfred Nowak, *The UN Covenant on Civil and Political Rights: CCPR Commentary*" (N.P. Engel, 1993) at 172 [29], and the decision of the Human Rights Committee in *Van Alphen v The Netherlands* (1990) HRC Comm. No. 305/1998). In effect, it is not sufficient that the detention be in accordance with the law; the law itself must not be arbitrary. To that end, it is of paramount importance that there are safeguards inherent in the power to detain.

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3 *Prevention of Terrorism Act 2005* (UK), s.13.

Further, although it must be acknowledged that dealing with terrorist threats in the current international climate presents particular problems, the exigencies of dealing with a terrorist situation cannot justify arbitrary detention (see, for a view on the application of the European Convention on Human Rights: *Fox, Campbell & Hartley v UK* (1990) ECHR Applic No. 12244/86 at [32]).

In our view, the Bill does not include sufficient safeguards to ensure the protection of individual rights and compliance with Australia's obligations under treaty and customary law. In particular, there are two areas in which the Bill ought to be amended.

First, although generally the Bill is to be commended for the requiring most decisions about the imposition of a preventative detention order to a judge or retired judge, the Bill permits an initial preventative detention order to be made by a Senior AFP member, on the application of an AFP member (105.8). Although an initial preventative detention order is limited in time to 24 hours, it still involves a substantial restriction on the right to liberty, and in the circumstances ought to involve a judge. Given that provision is made in most Australian courts for the hearing of urgent matters on very short notice, it is submitted that the involvement of a judge in the making of an initial preventative detention order is to be preferred. Alternatively, confirmation of an initial preventative detention order by a judge ought to be required within four hours of detention, to better ensure that such an order is justified in the circumstances.

Second, the provisions of the Bill relating to contact of the detained person with their family raise serious concerns about privacy and right to family life. A detained person may contact their family but is not able to disclose the fact that a preventative detention order has been made and their conversation may be monitored (105.35). This represents an unjustified interference with Article 17 of the ICCPR provides that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

5 Impact on effective legal representation

Several provisions of the Bill interfere with the right to effective legal representation. Communications between a person held in preventative detention, and their lawyer may be monitored and recorded (105.37-105.38). In our view, even if this information is not admissible as evidence, it is an interference with the right to legal professional privilege. The High Court of Australia has observed that:[4]

> Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity.

In addition, we note that as a matter of practicality, it may be difficult to persuade clients who are being recorded to communicate openly with their legal representatives.

The ability to obtain effective legal representation may be further constrained by the prohibition on lawyers disclosing that their client is detained (105.41). It is possible this may, for example, prevent lawyers from seeking advice about their client's case from other, more qualified practitioners.

6 Curtailment of effective legal remedy

The provisions of the Bill which limit the rights of detained or controlled persons to seek review of the legality of their detention or control raise serious concerns about an entitlement to an effective legal remedy.

The Bill allows for an application to be made to the Administrative Appeals Tribunal (**'AAT'**) for review of preventative detention orders, however the time for review is restricted in that an application cannot be made while the order remains in force (105.51). As such, the AAT is unable to provide an effective remedy, namely release, at relevant time. In our view it is wholly inadequate for

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[4] *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, para.11, per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

compensation to be the only available remedy. It is also unsatisfactory to exclude judicial review of the detention.

7 Reporting or review mechanism

Finally, we are concerned that the Bill does not contain a requirement for reporting or review of its operation to ensure that the powers conferred by the Bill are properly exercised. We suggest that the Bill include a provision to this effect, in similar terms to s.14 of the *Prevention of Terrorism Act 2005* (UK).[5]

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[5] Section 14 provides:

(1) As soon as reasonably practicable after the end of every relevant 3 month period, the Secretary of State must-

(a) prepare a report about his exercise of the control order powers during that period; and

(b) lay a copy of that report before Parliament.

(2) The Secretary of State must also appoint a person to review the operation of this Act.

(3) As soon as reasonably practicable after the end of-

(a) the period of 9 months beginning with the day on which this Act is passed, and

(b) every 12 month period which ends with the first or a subsequent anniversary of the end of the period mentioned in the preceding paragraph and is a period during the whole or a part of which sections 1 to 9 of this Act were in force,

the person so appointed must carry out a review of the operation of this Act during that period.

(4) The person who conducts a review under this section must send the Secretary of State a report on its outcome as soon as reasonably practicable after completing the review.

(5) That report must also contain the opinion of the person making it on-

(a) the implications for the operation of this Act of any proposal made by the Secretary of State for the amendment of the law relating to terrorism; and

(b) the extent (if any) to which the Secretary of State has made use of his power by virtue of section 3(1)(b) to make non-derogating control orders in urgent cases without the permission of the court.

(6) On receiving a report under subsection (4), the Secretary of State must lay a copy of it before Parliament.

(7) The Secretary of State may pay the expenses of a person appointed to carry out a review and may also pay him such allowances as the Secretary of State determines.

(8) In this section-

"control order powers" means-

(a) the powers of the Secretary of State under this Act to make, renew, modify and revoke control orders; and

(b) his powers to apply to the court for the making, renewal, revocation or modification of derogating control orders;

"relevant 3 month period" means-

(a) the period of 3 months beginning with the passing of this Act;

(b) a period of 3 months beginning with a time which-

(i) is the beginning of a period for which sections 1 to 9 are revived by an order under section 13; and

(ii) falls more than 3 months after the time when those sections were last in force before being revived;

(c) a 3 month period which begins with the end of a previous relevant 3 month period and is a period during the whole or a part of which those sections are in force.

8 Conclusion

In our view it is imperative that the Committee's report to Parliament include the following recommendations:

(i) there is a need for extensive political debate and public consultation about the human rights implications of the Bill;

(ii) it is a violation of principles of natural justice and procedural fairness to allow a court to impose an interim control order without giving the person concerned an opportunity to make submissions and present a defence (104.4);

(iii) the Bill should include a time limitation after which interim control orders expire;

(iv) the national security exception to providing information upon which control orders have been varied (104.26(2)) should be removed;

(v) the standard of proof for the imposition of interim control orders should be changed from the balance of probabilities (104.4(1)(c)) to beyond reasonable doubt;

(vi) the test for imposing an interim control order of "substantially assist in preventing a terrorist act" (104.4(1)(c)) is an insufficiently high threshold for interference with liberty;

(vii) it is inappropriate for the breach of a control order to be classified as a criminal offence, punishable by 5 years imprisonment (104.27);

(viii) the sunset provision of 10 years (104.32) is manifestly excessive;

(ix) it is inappropriate to allow an initial preventative detention order to be made by a Senior AFP member, on the application of an AFP member (105.8);

(x) the provisions imposing restrictions on, and allowing recording of, conversations between a detained person and their family should be removed (105.35);

(xi) the provisions allowing conversations between a detained person and their lawyer should be removed (105.37-105.38);

(xii) a wider range of remedies should be available to the AAT, which should be able to hear reviews while the orders remain in force to ensure an effective legal remedy is available; and

(xiii) the Bill should contain a reporting or review mechanism.

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11 November 2005