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Mr Bill Stefaniak, MLA
Chair of Standing Committee on Legal Affairs,
ACT Legislative Assembly
GPO Box 1020
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Dear Mr Stefaniak,

Submission on Exposure Draft: Terrorism (Extraordinary Temporary Powers) Bill 2005

The Human Rights Office welcomes the opportunity to make a submission on *Terrorism (Extraordinary Temporary Powers) Bill 2005 (ACT)* ('the TETP' Bill) to your Committee. In general we support the very specific human rights protections in the draft Bill, and rely on the premise that the threat of terrorism is sufficiently serious to require legislation authorizing the exceptional use of preventative detention of persons for up to 14 days, and extended police powers to stop, search and seize in preventing and investigating terrorist acts.

I previously provided advice on the draft Federal Anti-Terrorism Bill (No. 2) under section 41 of the ACT *Human Rights Act 2004* ('HR' Act) to the ACT Chief Minister and Attorney-General, Jon Stanhope. In that advice (attached) we considered the question whether provisions of the Bill, if enacted in the ACT, would be compatible with the HR Act, which is based on many provisions in the International Covenant on Civil and Political Rights ('ICCPR'). I found that the Federal legislation was incompatible in a number of respects, and was consulted about overcoming these problems in drafting the ACT Bill. The Office has also previously made submissions to the Senate Legal and Constitutional Legislation Committee inquiry into the Anti-Terrorism Bill (No.2) 2005 ('the Federal Bill') which are attached. These documents are also available on the Human Rights Office website at <http://www.hro.act.gov.au>.

Introduction

The ACT Bill has been drafted with reference to the HR Act, is narrower in scope and contains many more safeguards than the *Federal Anti-Terrorism (No. 2) Act 2005*. It also implements all the relevant recommendations in the Senate Legal and Constitutional Legislation Committee Report on the Federal Bill.

The ACT Bill, together with complementary Federal,¹ as well as corresponding State legislation, is designed to enable better deterrence, prevention, detection and prosecution of terrorist acts. Commentators on the Federal Bill, including this Office, questioned the need for new legislation given both the extensive powers under existing law and the lack of publicly available evidence of more than a medium threat to the nation. Our submission is made on the basis that such evidence exists and was confidentially presented to Council of Australian Governments ('COAG') meeting of 27 September 2005. The Preamble to the TEPT recognises this factor specifically, as well as stating that the Bill is necessary, effective, contains safeguards against abuse, is evidence-based, intelligence-led and proportionate. However, we note that there appears to be no 'public emergency which threatens the life of the nation' as the Federal government has not communicated any derogation from the ICCPR under article 4. In contrast, the United Kingdom has communicated a derogation under the ICCPR, as well as the European Convention on Human Rights.

The central question in considering the draft TETP Bill is whether the legislative means proposed are strictly proportionate to the legitimate objective of protecting the Australian community from the risk of terrorism. Security issues are relevant to any enquiry of proportionality under section 28 of the HR Act as to whether or not the objectives of the government could be achieved by less restrictive means. This Office does not have the information nor expertise to assess the relevant security risks in commenting on this issue of proportionality. In the event that the ACT Supreme Court was asked to interpret the ACT legislation (or any part of it) under section 30 of the HR Act or if a Declaration of Incompatibility was sought under section 32, the government would present its case for the necessity of the law, and such proceedings would be subject to the *National Security Information (Criminal and Civil) Proceedings Act 2004*. We support the decision to give the Supreme Court sole jurisdiction over preventative detention cases, given the special role of the Supreme Court under the HR Act, the high level of significance of the issues that may arise, and the implicit sensitivity of evidence, which will require appropriate and tailored procedures.

In matters of high government policy, for example national security, courts have taken the view that they should give a degree of deference to the Executive.² In the context of the UK *Anti-terrorism, Crime and Security Act 2001* the House of Lords stated:

'The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions.'³

¹ Including the *Security Legislation Amendment (Terrorism) Act 2002*; *ASIO Legislation Amendment (Terrorism) Act 2003*; *Criminal Code Amendment (Terrorist Organisations) Act 2004*; *Anti-terrorism Act 2004*; *Anti-terrorism Act (No.2) 2004*; and *Anti-terrorism Act (No.3) 2004*.

² *Libman v AG of Quebec* (1998) 3 BHR 269 at 289, Privy Council in *A-G of Hong Kong v Lee Kwong-Hai* [1993] AC 951 at 975.

³ *A & Ors v Home Secretary* [2004] UK HL 56.

The House of Lords decided that the legislation was incompatible with the UK *Human Rights Act 1998* because, in applying only to foreigners, it discriminated against them. It is for the court to decide whether the measure is rationally connected to the political crisis or is disproportionate.

General human rights issues

This submission measures the provisions of the TEPT Bill against the ACT HR Act, taking into account sources that are relevant to the interpretation of human rights under section 30 of the HR Act. This includes the jurisprudence of: the UN Human Rights Committee under the International Covenant on Civil and Political Rights ('ICCPR'); the European Court of Human Rights; and the relevant domestic jurisprudence from comparative jurisdictions, such as the UK, New Zealand and Canada. Specific UN documents considered include the Standard Minimum Rules for the Treatment of Prisoners and the UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment.

Governments have a positive obligation to take measures necessary within their jurisdiction to protect the individual's 'right to life,' against terrorist acts (s.9(1) ACT HR Act),⁴ but this aim must be achieved compatibly with respect for the human rights of detainees.⁵ There is not sufficient international human rights jurisprudence to support the notion of a communal 'right to security'.⁶

Several bodies have considered the protection of human rights in the context of anti-terrorism laws. The most significant authority is the UN Security Council Resolution 1456 of 2003 which clearly states that States Parties 'must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt measures in accordance with international law, in particular international human rights, refugee, and humanitarian law'. The former UN High Commissioner for Human Rights, Mary Robinson, issued a statement setting out criteria for protecting human rights in the context of implementing anti-terrorism measures, and recommended that laws use precise criteria and not confer unfettered executive discretion. These principles require that restrictions be:

- prescribed by law (that is, they are not arbitrary in substance);
- necessary for public security or public order (there is a pressing social need);
- not impair the essence of the right;
- necessary in a democratic society (they are a product of consensus);
- in conformance with the principle of proportionality;⁷
- appropriate to achieve that aim;
- the least intrusive means to achieve the aim of the measures;
- respectful of the principle of non-discrimination; and
- not arbitrarily applied.⁸

⁴ *Osman v UK* (1999) 29 EHRR 245.

⁵ UN Security Council Resolution 1456 of 2003.

⁶ C. Michaelsen, 'Security Against Terrorism: Individual Right or State Purpose, (2005) 16 *Public Law Review* 173.

⁷ There is a balance between the benefits expected from them on one hand, and on the other hand their adverse consequences for the individual concerned, as well as the free exercise in the right that is being restricted. See Appendix on section 28 of the *ACT Human Rights Act 2004*.

The Council of Europe's Guidelines on Human Rights and the Fight Against Terrorism, were adopted by the 45 Member States of Europe (and accepted by the UK Joint Committee on Human Rights) as the appropriate framework within which the debate about counter-terrorism measures should be conducted. The Guidelines specify that national 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.⁹ The International Commission of Jurists (ICJ) has also produced Guidelines and Recommendations on Anti-terrorism Laws.¹⁰ Article 3 of the ICJ's Berlin Declaration states that:

‘States should avoid the abuse of counter-terrorism measures by ensuring that persons suspected of involvement in terrorist acts are only charged with crimes, which are strictly defined by law that are not retroactive, and in conformity with the principle of legality (*nullum crimen sine lege*). States may not apply criminal law retroactively. They may not criminalise the lawful exercise of fundamental rights and freedoms. Criminal responsibility for acts of terrorism must be individual, not collective. In combating terrorism, states should apply, and where necessary adapt, existing criminal laws rather than create new, broadly defined offences or resort to extreme administrative measures, especially those involving deprivation of liberty.’¹¹

In most important respects the draft ACT Bill is compliant with the HR Act. In addition to matters discussed in more detail below, we support the following provisions:

- the exemption of children from preventative detention;
- the lack of disclosure (of preventative detention) offences;
- the prohibition on rolling warrants and questioning of detainees;
- the limits on duration of preventative detention orders;
- the specification of proper location for the place of detention, and protocols for conditions of detention;
- the separation of detainees from persons in the criminal justice system, that is persons under conviction or remand;
- the presumption of confidential legal communications;
- the availability of legal aid;
- the 3 year sunset clause;
- the support required for persons with special needs, including mental health, cultural or religious
- the safeguards for children and people with impaired decision-making ability who are in the care of the detained person; and
- the requirement of transparency in the application process.

⁸ UN Doc. E/CN.4/2002/18, Annex, 27 February 2002.

⁹ See the Council of Europe's *Guidelines on Human Rights and the Fight Against Terrorism*, [http://www.coe.int/T/E/Human_rights/h-inf\(2002\)8eng.pdf](http://www.coe.int/T/E/Human_rights/h-inf(2002)8eng.pdf).

¹⁰ Council of Europe, *Guidelines on Human Rights and the Fight Against Terrorism*, H (2002) 004.

¹¹ International Commission of Jurists, *The Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, 28 August 2004.

We support the specific references in the Preamble to implementing UN resolutions on counter-terrorism consistently with human rights, the ICCPR and fundamental legal principles including the rule of law, respect for legal process and human rights.

Detailed Comments - Preventative detention

The ACT draft Bill appears to satisfy the above requirements, with the exception of the ICJ Declaration.¹² Preventative detention without charge or conviction of a criminal offence is inherently problematic in respect of the right of liberty (s.18 of the HR Act) and could potentially be a breach of fair trial rights in subsection 22(1) of the HR Act, including the presumption of innocence.¹³ The UN Human Rights Committee has held, in the context of a person subjected to preventative detention at the expiry of his criminal sentence, that preventative detention is not necessarily incompatible with a right to liberty.¹⁴ By contrast, the European Convention of Human Rights does not allow preventative detention of terrorists except when there is an emergency threatening the nation.¹⁵ The UK *Terrorism Act 2000* only permits 14 days detention prior to the laying of criminal charges. Under section 18 of the HRA, detention must not be arbitrary, it must be based on grounds and procedures established by law, (that is, sufficiently circumscribed by law and specifically authorised),¹⁶ information on the reasons must be given and court control of the detention must be available.¹⁷ The common law also does not generally sanction preventative detention.¹⁸

One effect of these requirements is that the domestic law on which the detention is based must be 'accessible and precise' in order to enable the citizen to foresee the consequences that a given action may entail.¹⁹ A detention will be 'arbitrary' if it is not in keeping with the purposes of article 9 of the ICCPR (s.18 of the ACT HR Act), or if it is disproportionate. As stated by the UN Human Rights Committee:

'arbitrariness must be interpreted to include elements of inappropriateness, injustice and lack of predictability...remand in custody must not only be lawful but reasonable in all the circumstances, for example to prevent flight, interference with evidence or the recurrence of crime.'²⁰

¹² See above, *The Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, 28 August 2004.

¹³ The Human Rights Committee, which monitors compliance with the ICCPR, have emphasised that use of preventive detention for public security reasons must still comply with the right to liberty in article 9: *General Comment No. 8*.

¹⁴ *Rameka & Ors v New Zealand* UN doc. CCPR/C/79D/1090/2002; interpreting Article 9(1), which is equivalent to s. 18 HR Act.

¹⁵ See also the Newton Report, *Anti-terrorism, Crime and Security Act 2001 Review*.

¹⁶ Discussed in Joseph, Schultz and Castan p. 308.

¹⁷ UN Human Rights Committee, *General Comment No. 8*, para 4.

¹⁸ 'The involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing guilt.' As an exercise of judicial power 'citizens enjoy... at least in times of peace a constitutional immunity from being imprisoned... except pursuant to an order of the court in the exercise of the judicial power of the Commonwealth': *Chu Keong Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) per Brennan, Deane and Dawson JJ, 176 CLR 1 at pp.27-28.

¹⁹ See for instance under the European Convention on Human Rights: *Sunday Times (No.1) v. UK* 2 EHRR 245; and *Steel and others v UK* (1999) 28 EHRR 603.

²⁰ *Alphen v Netherlands* UN doc. CCPR/C/39/C/305/1988 (1990) Para 5.8.

Under the ACT Bill preventative detention orders may only be made by the Supreme Court. As the Supreme Court also has a duty to interpret legislation compatibly with the HR Act the court will need to be satisfied on any particular set of facts in individual cases, that remand in custody is ‘reasonable in the circumstances’ as outlined above.

Section 21 of the HR Act provides for the right to a fair trial and applies to both civil and criminal proceedings. Section 22 provides higher and more detailed safeguards for criminal trials. It is conceivable that, despite the orders being preventative in nature, they may constitute ‘criminal’ rather than civil proceedings for the purposes of section 21 of the HRA.²¹ If this were so, the standard of proof should be beyond reasonable doubt, rather than the existing balance of probabilities. There would be a higher threshold of protection in relation to the person’s right to be heard, right of access to evidence and rights of legal representation. Irrespective of the characterisation of the proceedings as criminal or civil, as a matter of good practice, on both human rights and constitutional grounds, the procedures under ACT law should as far as possible comply with criminal standards. This is consistent with the approach of the ACT Supreme Court.

In the ACT Supreme Court Chief Justice Higgins stated, in upholding the right to a hearing before a final order under the *Domestic Violence and Protection Orders Act 2001* (ACT) that:

‘The ICCPR provides procedural guarantees in respect of both criminal and civil trials. It is, in truth, but a re-statement of the right to due process enshrined in Magna Carta. It is inconsistent with those guarantees for a person to be deprived of his or her liberty, wholly or partially, or be exposed to criminal sanctions without “a fair and public hearing by a competent, independent and impartial tribunal established by law”.

It would, in my view, be incompatible with that standard to permit orders, such as personal protection orders, to be made in the absence of one party, without review by a judicial officer giving all other parties, particularly those restricted by such orders, a proper and fair opportunity to be heard, including the application of the presumption of innocence until the contrary be proved. The international standard does not mandate proof beyond reasonable doubt but the process must be proportionate to the legitimate objectives to be served.’

In its previous comments on the Federal Bill, our Office called for all preventative detention orders to only be issued by independent judicial officers – this is provided for under the draft ACT Bill. As affirmed in the recent ACT Supreme Court decision

21 *Clingham v Royal Borough of Kensington and Chelsea* [2003] 1 Cr. App 27 decided that antisocial behaviour orders were not criminal but the case can be distinguished and may be incompatible with other decisions. See *Steel v UK* (1998) 28 EHRR 603; Intern The case has been criticised by civil liberty organisations in UK and may not be followed in either the ECHR as not being compatible with *Steel v UK* (1998) 28 EHRR 603 or the courts of other jurisdictions. In *International Transport Roth GmbH v Sec of State for Home Dept* [2002] 3 WLR 344 Simon Brown LJ stated that the classification is secondary to the more directly relevant question of just what protections are required in the particular case to achieve a fair trial. In that case a higher standard of protection was upheld, because of the nature of the issues at stake.

of *I v S*,²² such orders are not administrative in nature and require judicial authority. While a detention order that is made ex parte is generally a breach of the right to a fair trial under section 21 of the HR Act, an ex parte order would be a proportionate response in a situation where the person is likely to evade the court if notice of the hearing was provided. For this reason we support the requirement in clause 21 for interim ex parte orders to be available only when the circumstances of the particular case require it, rather than as the standard procedure. Court procedures in sensitive areas, such as care and protection of children and family law cases, amply demonstrate the ability to act quickly when an emergency arises. Such court procedures are not unduly cumbersome nor an unrealistic demand on the Supreme Court, given particularly the small number of cases expected to arise under this exceptional legislation.

The Office welcomes the addition in clause 17(3)(b)(ii) of the TEPT Bill of the requirement that detaining the person is the ‘least restrictive way of preventing a terrorist attack’. The provision in the Federal Act that detention because a person ‘possesses something connected with the preparation for a terrorist act’ is too broad to meet the requirements of section 18 HR Act. As a result of this new subclause, the police officer will not be able to detain a person unless s/he can demonstrate to the court that seizure of the items will insufficiently safeguard against the commission of the terrorist act.

The threshold for detention under the TEPT Bill is that the Supreme Court is ‘satisfied on reasonable grounds’ under clause 19(4), instead of having ‘reasonable grounds to suspect’. This is closer to the threshold at committal stage in criminal proceedings. Being an objective test it requires greater precision in evidence and is less likely to breach section 18 of the HR Act as ‘arbitrary’. The Bill requires the interim order to be converted to a final order, or the person released within 24 hours (clause 21(6)). This satisfies the requirement that a person be brought ‘promptly’ before a judge. In a small jurisdiction there should be little difficulty for the Supreme Court to achieve this requirement.

An important guarantee in this draft Bill is the confidentiality between client and his/her lawyer. The right to communicate with a lawyer is paramount, particularly in the circumstances of preventative detention when meaningful contact with anyone else is prohibited. This access to legal advisors is also central to the right to privacy (s.12 HR Act). By virtue of the seriousness of the situation involving the detainee’s loss of liberty a right of confidential communication can also be implied as part of ‘equality of arms’ in a fair hearing in section 21. The routine monitoring of the communications between lawyer and client (provided in section 105.38 of the Federal Act) contravenes these rights. Clause 53 of the TEPT Bill, on the other hand, grants a more limited right to monitor contact. The provisions are taken directly from the UK *Terrorism Act 2000* (Schedule 8 sections 8 and 9). However, commentators on the UK Act have expressed the view that these provisions are incompatible with the UK *Human Rights Act 1998*,²³ citing relevant case law.²⁴ Subsections (a), (b) and (c) of clause 53 for instance do not refer to terrorist acts, but are expressed in very broad

²² *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125 (2 December 2005)

²³ Walker, *Blackstone’s Guide to the Anti-Terrorism Legislation*, 2002 p.138

²⁴ *Brennan v UK* 39846/98, The Times, 22 October 2001.

terms and cover ‘serious offences’. It is likely that these subclauses would need to be read down, in accordance with the rights to privacy and a fair trial,²⁵ together with the proportionality test in section 28 of the HR Act. We suggest that they be rephrased to require a relevant connection with terrorism.

We support the Bill’s express prohibition on evidence obtained by torture in clause 93. While it can confidently be said that common law principles render such evidence inadmissible,²⁶ the addition of obligations at international law (the UN Convention against Torture and Other Cruel, Inhuman and Degrading or Punishment, to which Australia is a party) and specific duties in regard to non-derogable rights under the HR Act, clause 93 removes this beyond doubt. In accordance with section 30 of the HR Act, clause 93 should be interpreted also to ensure that intelligence obtained from torture, perhaps from overseas countries in which the prohibition of torture is not observed, cannot be relied upon by police officers in their investigation. It would be inconsistent and anomalous if parliament intended that the police were able to rely on material at the investigation stage, which could not later be received into evidence.²⁷ The standard of proof as to whether evidence has been obtained by torture should require the applicant to raise a plausible argument (but not to prove) that evidence may have been obtained by torture, with it then falling to the court to make necessary enquiries. Evidence should then be inadmissible unless it can be proved that it was not obtained through torture.²⁸

Our Office supports the right to legal aid to the detainee subject to acceptance rather than at the discretion of the court, as provided in clause 49. European Court of Human Rights jurisprudence on this point of civil detention provides:

‘where a person is confined in a psychiatric institution on the ground of the commission of acts which constituted criminal offences, but for which he could not be held responsible on account of mental illness, he should - unless there are special circumstances - receive legal assistance in subsequent proceedings relating to his detention. The importance of what is at stake for him- personal liberty- taken together with the very nature of the affliction – diminished mental capacity – compels this conclusion.’²⁹

The right of humane treatment for persons in detention is required under section 19 of the HR Act. The Office supports the measures in the TEPT Bill to comply with this right. In particular, we support the development of written arrangements for treatment in detention in consultation with the Human Rights Commissioner, Ombudsman and Public Advocate, and the right to visit places of detention by the Human Rights Commissioner, Ombudsman, Public Advocate and Public Interest Monitor. We agree

²⁵ Compare the Senate Committee Recommendation 14 that monitoring only occur where the AFP Officer has ‘reasonable grounds to believe that the consultation will interfere with the purpose of the order’ Senate Report, Legal and Constitutional Legislation Committee, November 2005.

²⁶ *A & Ors v Home Office* [2005] UKHL 71.

²⁷ The view expressed in the UK House of Lords by Lord Bingham. The majority of the House found that the Executive could not be constrained in this way but differences in administrative law might make their view inapplicable in Australia.

²⁸ This was the view of a strong dissenting minority in the *A & Ors v Secretary of State for the Home Dept* [2005] UKHL 71. The House divided 4/3 on the issue.

²⁹ *Megyeri v Germany* (1993) 15 EHRR 584, followed by *Magalhaes Pereira v Portugal* (2003) 36 EHRR 49.

that the specific matters listed in clauses 40(4) and 50) should be included in the arrangements and guidelines.

The legislation must not have a disproportionately adverse impact on Australian Muslims,³⁰ who have the rights to equality and not to be discriminated against under articles 26 and 2(1) of the ICCPR (and s.8 of the ACT HR Act), as well as protection as members of minority groups under article 27 of the ICCPR (and s.27 of the ACT HR Act). In the administration of the Act it will be important to avoid racial profiling which could contravene the HR Act by directly or indirectly discriminating against minority populations. This could arise for instance in the use of the search and seizure powers.

Detailed Comments - Special powers

The special search and seizure powers in Part 3, Division 3.4 of the TEPT Bill engage several human rights. These include the right to privacy and reputation (section 12), the right to freedom of expression (section 16), the right to a fair trial (sections 21 and 22) and right to equality before the law and non-discrimination in the exercise of human rights (section 8). These rights, singly or in conjunction with each other can limit the extent to which it is possible to search premises and seize property, and can require procedures to be in place when search and seizures occur.

The right to privacy in section 12 goes far beyond a concept of privacy as generally understood under statute and common law. It encompasses ‘the sphere of a person’s life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone.’³¹ It encompasses the activities of an individual in his/her professional life as well as personal life and therefore covers searches of office files.³² The right should not be subject to ‘unlawful or arbitrary’ interference. The law must be precise and circumscribed so as not to give decision makers too much discretion in authorising interferences with privacy. Interference provided for precisely by law should be in accordance with the provisions, aims and objectives of the HR Act and should be reasonable.

Entry, search and seizure powers must therefore: pursue a legitimate aim provide safeguards against abuse; have no other less intrusive methods of obtaining the information required; and the power of search must be exercised in practice in a manner that is proportionate. The TEPT Bill limits the application of the special search and seizure powers by requiring prior Supreme Court authorisation (clause 70) by strictly circumscribing the circumstances in which they can be used and by limiting their duration. In making its decision on any particular occasion the Supreme Court will need to ensure that the requirements of the HR Act, are observed in practice by police. The special powers include a right to search the person. In accordance with clause 77, this can include a ‘frisk’ search and ‘ordinary search.’ The circumstances where the more invasive a ‘strip search’ can be conducted is limited to

³⁰ ‘The Impact of Anti Terrorism Powers on the British Muslim population’ Liberty, June 2004; Hillyard, *Suspect Community-People’s Experience of the Prevention of Terrorism Acts in Britain* (1993). See also the Council for Racial Equality Submission to the Joint Committee on Human Rights, Review of Counter-terrorism Powers, 2003-4 HL 18th Report, Appendix 1.

³¹ *Coriel and Aurik v The Netherlands* (453/91).

³² *Niemetz v Germany* (1993) 16 EHRR 97).

‘target persons’ under section 1.4 of Schedule 1. By contrast, the comparable provisions of the UK Terrorism Act are limited to an ordinary search.³³

Comparative jurisprudence on search and seizure powers is of some assistance. In *Funke v France* (1993) 16 EHRR 297 it was held that the wide powers of customs officers under French law to assess the expediency, nature number length and scale of inspections were unduly wide and were therefore disproportionate. Although the jurisprudence establishes that a warrant is not essential before a search takes place, in the absence of such a warrant, the proportionality test will be strictly applied to ensure a minimum of interference with the privacy right.³⁴ However, the Canadian case law clarified that search and seizure powers must be exercised with prior authorisation by someone capable of acting judicially and independently, weighing the conflicting interests of law enforcement and individual rights.³⁵

In relation to special stop, search and seize powers of the AFP the Office welcomes the fact that, unlike in the Commonwealth Act, the powers are subject to judicial authorisation and review. We support mechanism of authorisation by the court on application of chief police officer, after written approval by Chief Minister and the special privacy protections for women subjected to frisks or strip searches. Strip searches of detainees amount to a severe interference with rights to the physical and mental integrity of the person, to privacy (s.12 of the HR Act) and humane treatment in detention (s.18).³⁶ The authorities have a duty to ensure that strip searches are conducted in a respectful manner upholding the dignity of the person in order to impair as little as possible on a person’s rights.

Conclusion

The ACT government has clearly made a serious effort to construct this Bill in a way that is human rights compliant. We believe that it is a considerable achievement to have reconciled the need to protect the rights of the individual detainee with protecting society against terrorism. The specific provisions compares favourably with the Federal Act, which they are designed to complement. The Bill may indeed serve as a model to other jurisdictions of the value of human rights framework in protecting basic rights and freedoms without sacrificing the safety of the public. In particular this applies to Victoria, which has committed to enacting a Human Rights Charter later this year. I look forward to giving oral evidence to the Committee on 31 January 2005 with Dr Rowena Daw of this Office.

Yours sincerely,

Dr Helen Watchirs
ACT Human Rights and Discrimination Commissioner
23 January 2006

³³ ‘A constable ...may not require a person to remove any clothing in public except for headgear, footwear, an outer coat a jacket or gloves’ (section 45(3) Terrorist Act 2000) and the search must be carried out ‘at or near’ the place where he or she is stopped. (section 45(4)).

³⁴ *Camezind v Switzerland* (1999) 28 EHRR 458.

³⁵ *Hunter v Southam Inc* [1984] 2 SCR 145.

³⁶ *Van der Ven v Netherlands* (2004) 38 EHRR 46).