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Inquiry Secretary
Standing Committee for Legal Affairs
Legislative Assembly for the ACT
PO Box 1020
CANBERRA CITY ACT 2601

Dear Committee

Exposure Draft: Terrorism (Extraordinary Temporary Powers) Bill 2005

Thank you for the opportunity to make a submission to the inquiry into the Exposure Draft of the Terrorism (Extraordinary Temporary Powers) Bill 2005 (the Bill).

The Bill reflects the commitment given by the ACT Chief Minister to enact corresponding legislation as part of a national counter-terrorism regime agreed at the Coalition of Australian Governments meeting of 27 September 2005. We have previously raised concerns about the impact on human rights of the federal anti-terrorism legislation enacted as part of this regime, and the proposals for corresponding State and Territory legislation.[1] We have noted particular problems with preventative detention of terror suspects who have not been charged with any criminal offence.

It is significant in this context that the ACT is the only Australian jurisdiction which has specific legislative protection for human rights in the *Human Rights Act* 2004 (ACT). We consider that the ACT government played an important role in the national debate in drawing attention to breaches of human rights in drafts of the federal legislation. We acknowledge and commend the commitment of the ACT government to ensuring that the ACT legislation is compliant with international human rights standards and with the *Human Rights Act.*

Overall, although we continue to have concerns over the lack of publicly available information to justify a preventative detention regime, we consider that the Bill contains important safeguards which substantially address our criticisms of the federal legislation. We believe that these safeguards, in particular the provision of a full judicial hearing for preventative detention orders, represent a more

[1] See eg our submission (No 206)to the Senate Legal and Constitutional Committee Inquiry into the Provisions of the Anti-Terrorism Bill (No 2) 2005 and our advice to ACT Chief Minister 'Human Rights Implications of the Anti-Terrorism Bill'dated 18 October 2005 available at http://www.chiefminister.act.gov.au/whats_new.asp?title=What's%20New

proportionate response to the threat of terrorism, minimising unnecessary intrusion upon individual liberties. Our submission examines focuses particularly on the human rights implications of preventative detention, and provides suggestions for amendments to specific provisions to further improve compliance with human rights standards.

We note that our colleagues Simon Bronitt, Mark Nolan, Miriam Gani and Prita Jobling have prepared a comprehensive submission dealing with specific drafting concerns with the Bill. We endorse and support the amendments recommended in that submission.

Application of human rights standards

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. Section 18 of the *Human Rights Act,* which is drawn from Article 9 of the International Covenant on Civil and Political Rights (ICCPR) provides that:

> (1) Everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained.
> (2) No-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.

Section 28 of the *Human Rights Act* provides that "human rights may be subject only to such limits imposed by Territory laws which can be demonstrably justified in a free and democratic society". This provision imposes an onus upon the 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. According to the explanatory statement to the Human Rights Bill 2003 as introduced into the Legislative Assembly, section 28 "provides one standard against which to measure justifications for limits on human rights". This standard is provided by the principles of *necessity* and *proportionality*.

The provisions of the ACT Human Rights Act must be interpreted in the light of international law and the judgments of foreign and international courts and tribunals relevant to a human right (Section 31).[2] The jurisprudence of the United Nations Human Rights Committee (UNHCR), under the ICCPR deserves particular attention.

The UNHCR has stated in its General Comment 31 that:

> Any restrictions on any of [ICCPR] rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure

[2] The Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Robert K. Goldman, submitted to the members of the Commission on Human Rights by the High Commissioner for Human Rights (E/CN.4/2005/103, 7 February 2005) states that, "all international, regional and national action concerning terrorism should be guided by the United Nations Charter, all general principles of law, all norms of human rights as set out in international and regional treaties, and all norms of treaty-based and customary humanitarian law. Due attention should be paid to the United Nations or regional treaty bodies, in particular any comments or commentary on specific treaty articles or issues". In other words, "All counter-terrorism measures should comply fully with all rules of international law, including human rights and humanitarian law, as interpreted by treaty bodies, experts of Charter-based bodies and other sources of international law."

> continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.[3]

In our view it is unfortunate that the public debate about the national counter-terrorism laws has not been informed by any specific or reliable evidence about the real level and nature of the terrorist threat in Australia. The federal government relied largely upon assertions and references to terrorist attacks which have taken place overseas to justify the need for measures including preventative detention. The lack of information makes it difficult to independently assess whether the restrictions upon human rights which are an unavoidable consequence of any preventative detention regime can be justified in the ACT.

We acknowledge, however, that there are difficulties in publicising sensitive security information, and that the ACT government has formed the view, based on the confidential briefings and other evidence, that such powers are necessary and appropriate for the Territory. We accept that such a judgment, assuming it is soundly based, is likely to fall within the margin of appreciation which international human rights jurisprudence allows to the executive in relation to matters of national security.[4] Importantly, the Bill is subject to a review within a period of three years, which will provide an opportunity to re-evaluate the need for these measures, and the law will cease to have effect after five years.

The United Nations Human Rights Committee, in its General Comment on article 9 has stated:[5]

> [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, [dealing with criminal proceedings] 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."[6] Accordingly, where preventative detention is considered necessary for reasons of public security, the inclusion of safeguards for the rights of those detained will be critical to avoid the detention being arbitrary and to ensure that the Bill conforms to the principle of proportionality.

Safeguards included in the Bill

The difference in approach between the federal *Anti Terrorism Act (No 2) 2005*, and the Bill is apparent from the preamble to the Bill, which provides a specific commitment to ensuring that the measures in the Bill respect and promote the values reflected in, and the rights and freedoms guaranteed by, the ICCPR. The Bill will of course also be subject to the interpretive provision in section 30 of the *Human Rights Act,* which requires legislation to be construed to be consistent with human rights so far as possible, (and subject to the purpose of the legislation) which should further

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[3] UNHCR General Comments No 31, 26 May 2004, para 6. See also the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).
[4] See eg *Libman v AG of Quebec* (1998) 3 BHRC 269 at 289 and the Privy Council in *A-G of Hong Kong v Lee Kwong-Hai* [1993] AC 951 at 975
[5] General Comment No. 8, para.4 (1982).
[6] *Van Alphen v The Netherlands*, Comm No 305/1988, para 6.3

ensure that safeguards in the Bill will be given a broad and generous interpretation by the courts and the executive.

Our most serious concerns about the preventative detention provisions in the federal anti-terrorism legislation related to the lack of judicial scrutiny of preventative detention orders, the ex-parte nature of proceedings, the low threshold for the issuing of orders, the draconian penalties for communicating the fact of detention, the application of preventative detention to children, and the potential for detainees to be held in prisons with those charged or convicted of criminal offences. We are pleased to note that each of these concerns has been substantially addressed in the Bill. While we have not individually commented upon the many other safeguards contained in the bill, this should not be taken to diminish the significance and cumulative effect of these provisions in ensuring that preventative detention is not arbitrary.

Of particular importance is the provision for the ACT Supreme Court to have jurisdiction over the granting of both interim and final preventative orders, upon application by a senior police officer. It is appropriate that the Court, rather than the executive will ultimately determine the proportionality and human rights compliance of preventative detention orders on a case by case basis. As noted by the European Court of Human Rights:

> The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary.[7]

It is also important that the threshold test for a preventative detention order is not mere suspicion, as under the federal legislation, but that under section 19 the Court must be satisfied on reasonable grounds that detaining the person is reasonable and necessary to prevent an imminent terrorist attack, and is the least restrictive way of achieving that objective. Section 18(5) and (6) also provides an important guarantee of transparency in application process as the police must disclose all matters, whether they are favourable or adverse to a decision to make the order, and the information must be sworn on oath.

The Bill, unlike the federal legislation, does not criminalise any disclosure of information by the person in detention or their families or others, and in section 47 (3) sensibly permits the disclosure of the fact that the person is in preventative detention, and the place and duration of the detention, to family members. Thus although the Bill still limits the right to freedom of expression, the limitation is a more proportionate and justifiable limitation than that section 105.41 of the Criminal Code introduced by the federal legislation, which contains draconian criminal sanctions for disclosure.

The prohibition on preventative detention orders for children under section 11 is an essential and commendable safeguard which complies with the obligation under section 11 of the *Human Rights Act*, and under the Convention on the Rights of the Child for children to be accorded special protection in recognition of their particular vulnerability.

The Bill also addresses concerns about the place and conditions of detention, in accordance with international standards which provide that "persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons." [8] Section 40 of the Bill specifically provides that detention arrangements

[7] *Al-Nashif v. Bulgaria, ECHR, 20 June 2002 (par. 123)*

[8] Principle 8 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (U.N.G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988)).

must be consistent with human rights and that detainees must be segregated from convicted or remanded prisoners.

Suggested Amendments

While we endorse the many safeguards contained in the Bill, there are specific provisions which could be amended to further improve compliance with human rights standards. We note the following issues and suggested amendments.

1. Presumption that the hearing should not proceed if the person is unrepresented.

Although section 14(4) of the Bill provides that a person the subject of a preventative detention application is entitled to be represented at the hearing by a lawyer of their choice, and section 48(4) obliges the Legal Aid Commission to provide representation to a detained person on request, it remains possible that the person may not have arranged legal representation by the time of the hearing, for example if the person is detained late in the evening under an interim order and brought to Court for a hearing the next morning.

Section 14(8) states that a final application may be heard in the absence of the person or their lawyer if the Court is satisfied that the person was properly notified of the hearing.

We consider that given the very serious nature of the proceedings, there should be a presumption that the Court should not proceed to determine a final application against a person where the person is unrepresented, except where the person has refused legal aid representation, or there are other exceptional circumstances. The Court should have the power to order the legal aid commission to represent a person in proceedings who would otherwise be unrepresented.

2. Requirement of diligence where order is for the preservation of evidence

Where the application for a preventative detention order is sought under section 17(5) for the purpose of preserving evidence of a terrorist attack, the applicant should be required to satisfy the Court that the investigation is in fact being conducted diligently and expeditiously, to avoid the person being detained for any longer than strictly necessary while the evidence is secured. We note that such a requirement is contained in the UK *Terrorism Act 2000*.[9]

3. Use of information obtained as a result of torture or cruel, inhuman or degrading treatment

Section 93 of the Bill quite properly provides that evidence obtained, directly or indirectly, as the result of torture (wherever committed) is not admissible in proceedings under the Act, and refers specifically to Australia's obligations under article 15 of the UN Convention against Torture (CAT). However, given the recent examples in the international sphere of definitional debates over whether certain "enhanced interrogation techniques" amounted to "torture" under Convention – when they in any event clearly amounted to prohibited cruel, inhuman or degrading treatment, it would be advisable to ensure that such arguments were not encouraged under the Bill. We note that section 45 of the Bill recognizes that detainees should not be subjected to cruel inhuman and degrading treatment, and consider that the evidence provisions should be consistent with this approach.

Accordingly:
(a) the prohibition should be extended to cover evidence obtained, directly or indirectly, as the result of cruel, inhuman or degrading treatment or punishment. Article 16 of the CAT requires Australia to take all appropriate measures to prevent such conduct.

[9] *Terrorism Act 2000* (UK) Clause 32(1)(b) of Schedule 8.

(b) the prohibition on the use of such evidence should extend to use in any other proceedings against that person in the Territory as well as proceedings under the Bill.

Similarly, in section 18(1)(f), it would be appropriate to expand the provision to require that the person applying for the order must state not only that the officer does not suspect that any of the facts are based on information obtained directly or indirectly from "torture", but also that they have not been obtained directly or indirectly from "cruel, inhuman or degrading treatment."

4. Carrying out preventative detention orders

Under section 32 of the Bill, a person who is being taken into custody under a preventative detention order may ask for details of the police officer's name, place of duty and identification, and if asked, officers are bound to provide this information. In our view it would be more appropriate to require police to give this information in any event, so as not to disadvantage detainees who are not aware of their rights. In particular, where an officer is not in uniform the officer should be required to show evidence that the person is a police officer, whether or not the person specifically requests this information.

Under section 35, police may ask a person to give their name and address, in order to assist police in executing a preventative detention order. Police must give the person the reason for the requirement, and, if asked, must provide their own name place of duty and identification number. Failure to provide name and address when asked by police is specified to be a strict liability criminal offence with a maximum penalty of $1100. In our view, this provision should be amended to require police to warn the person that failure to comply with the request is a criminal offence, and to give identification if not in uniform. Strict liability offences pose give rise to inherent human rights concerns, and in this case, where, for example, the person may not speak English, or understand the request, there should be a provision for a defence of reasonable excuse. We note that the comparable federal provision in s105.21 of the Criminal Code provides such a defence.

5. Contact arrangements

While the contact provisions in the Bill are less restrictive than their federal counterparts, there are still room for improvements:

Section 47 of the Bill should provide police with discretion to allow the person detained to have additional contact with family members where they consider this appropriate, rather than only being allowed if the Court has specifically ordered it.

In section 53 of the Bill, it should be specified that if contact with the person's lawyer is required to be monitored, any evidence of the monitored communications should be inadmissible in any proceedings, and that the monitoring does not affect legal professional privilege.

6. Public Interest Monitor

Although we fully endorse the concept of the public interest monitor as an independent observer and safeguard in relation to preventative detention, we query why the Human Rights Commissioner, who is an independent commissioner with specialist human rights expertise should not fulfil this role. In such a small jurisdiction as the ACT, and the likelihood that such powers will be exercised infrequently, it would appear more appropriate to use the expertise of this independent statutory commissioner, who has responsibilities to monitor human rights compliance, rather than to create, train and resource a newly appointed panel of lawyers to carry out this function. If the Human Rights Commissioner is not

appointed as the Public Interest Monitor, we believe that additional notification provisions should be included to ensure that the Human Rights Commissioner is also kept informed of all relevant issues relating to the use of preventative detention powers.

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

Yours sincerely

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