Dr Hanna Jaireth
Inquiry Secretary – *Terrorism (Extraordinary Temporary Powers) Bill 2005*
Standing Committee on Legal Affairs
ACT Legislative Assembly
GPO Box 1020
Canberra ACT 2601

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20 January 2006

Dear Dr Jaireth,

Inquiry into Exposure Draft: *Terrorism (Extraordinary Temporary Powers) Bill 2005 (ACT)*

The Australian Muslim Civil Rights Advocacy Network (AMCRAN) is dedicated to preventing the erosion of the civil rights of all Australians, and, by drawing on the rich civil rights heritage of the Islamic faith, provides a Muslim perspective in the civil rights arena. It does this through political lobbying, contributions to legislative reform through submissions to government bodies, grassroots community education, and communication with and through the media. It actively collaborates with both Muslim and non-Muslim organisations to achieve its goals.

Introductory remarks

We thank you for your invitation to participate in the Committee's inquiry in relation to the above Bill.

We appreciate the ACT Government's courageous stance in the face of intense pressure, and indeed the Chief Minister must be thanked for allowing the much-needed debate to take place much earlier.

We also appreciate that the ACT is the only territory in this country with a Bill of Rights and that your Government sought legal and other advice in relation to the Federal *Anti-Terrorism Bill*.

We note that the NSW Government has already passed its complementary legislation, indeed, even before the Federal legislation was passed. We are pleased that other States and Territories including the ACT and Victoria decided to refer their respective draft bills for inquiry and report.

AMCRAN was strongly opposed to the amendments in the Federal *Anti-Terrorism Bill (No. 2)* 2005 that was introduced into Federal Parliament. We attach as **ATTACHMENT A** the submission we made to the Federal Senate Legal and Constitutional Committee Inquiry into the provisions of the *Anti-Terrorism Bill (No. 2)*, and we draw your particular attention

to pages 21 to 25. In this letter we outline our objections to the preventative detention regime generally. The suggestions included in this document should not be taken as an endorsement of the preventative detention regime.

We appreciate that the ACT bill has improved on many issues with the Federal *Anti-Terrorism Bill*, and we accept and agree with the variations made in the ACT bill as steps in the right direction. We are pleased to see improvements such as the introduction of public interest monitors, detainees being allowed to disclose their detention under a preventative detention order, detainees knowing with whom they cannot have contact under a prohibited contact order, the separation of detainees from people detained for criminal offences and that the Supreme Court may make an order for compensation if a person has been unfairly detained under a preventative detention order.

However, we remain concerned that there are a number of problems with some sections of the ACT bill, which we outline below.

Maximum Period of Detention

We submit that the maximum period of detention under the Bill is too long. We understand that the ACT government made an agreement at the COAG meeting that it would enact legislation to introduce a period of 14 days. However, this is inconsistent with other measures under the law, especially given that preventative detention orders can be applied to people not even suspected of a criminal offence. It is ironic that someone who is suspected of a criminal offence can only be held for up to 24 hours without being charged, yet a person held under a preventative detention order can be held for 14 times as long. Therefore we recommend that the period be shortened to something at least consistent with the maximum allowable period of detention under ASIO warrants (i.e., 7 days) which require the approval of the Attorney-General before an application is made to the issuing authority, rather than merely a senior police officer. Given that the Federal preventative detention regime already allows for detention for 2 days, we therefore suggest a more appropriate period is 5 days.

Recommendation 1: It is recommended that the maximum duration for which a person can be detained under a preventative detention order under the ACT legislation be reduced to 5 days.

Monitoring of discussions between detainee and lawyer

We note that clause 46 (2)(c) of the Bill specifically provides that a detainee is not restricted from having contact with his lawyer. Further, clause 53 states any such contact with a person “must not be monitored” unless a senior police officer issues a written direction if he or she believes on reasonable grounds that one or more of the consequences as listed in clause 53(2) may happen if their contact is not monitored. The consequences include:

(a) interference with or harm to evidence of, or relating to, a serious offence;
(b) interference with or physical harm to a person;
(c) the alerting of a person who is suspected of having committed a serious offence, but has not been arrested for it;

(d) interference with the gathering of information about the commission, preparing or instigation of a terrorist act;
(e) making it more difficult to prevent a terrorist act because a person is alerted;
(f) making it more difficult to secure a person's apprehension for a terrorist act because a person is alerted.

Our belief is that given the motivations for applying a preventative detention order in the first place, the police officer is likely to have "reasonable suspicion" that the above may occur in almost all cases where a person is preventatively detained. There is a very real possibility that as a consequence, seeking an exception under clause 53(2) will become a matter of course for every preventative detention order. There is nothing in the legislation to prevent this from happening.

While clause 53(2) makes some attempt to ameliorate the impact of such measures through the requirement to take into account the recommendations of the Public Interest Monitor (PIM), the PIM will not in fact be authorised to prevent such monitoring. Essentially, therefore, the PIM has no power with which to force the Senior Police Officer to change their position.

The privacy of communication between a lawyer and a client is an important part of a fair and free legal process that has a well-established tradition within the courts. Removing this right would serve to lead to the perception within the community that justice is not being appropriately served.

Recommendation 2(a): We recommend that clause 53(2) be excised from the bill.

Recommendation 2(b): If recommendation 2(a) is not accepted, the Public Interest Monitor should have a greater power to prevent the application of clause 53(2) than merely recommending so to the Senior Police Officer. For example, the PIM could appeal to a court to make a ruling on an urgent basis. It may be convenient to do so to the same judicial officer who made the order for the preventative detention.

Criteria for Preventative Detention Orders

One particular issue for the Muslim community is that in the aftermath of a terrorist attack, there is likely to be a great deal of pressure on police officers to imprison perpetrators.

In the tragic event of a terrorist attack, these provisions could be used to cast a wide net. Muslims would likely – due to racial profiling, whether conscious or unconscious – be severely affected by this. This is not mere speculation, but a concrete fear having observed the application of the notorious "material witness" measures in the US after the attacks of September 11. Under the material witness laws, individuals who have not committed any crime themselves may nonetheless be detained for extended periods of time[1]. The

[1] Levenson, L. *Detention, Material Witnesses & The War On Terrorism,* Loyola of Los Angeles Law Review, Vol 35 Jun 2002.

preventative detention measures, while not as severe, raise the spectre of the material witness measures in the US.

Two months after the 9/11 attacks, up to 1,100 people, mostly Muslim, were detained under the material witness provisions[2]. The exact number is not known, as there is no requirement that the US report on people detained. Even as late as 2005, it is believed that up to 70 people are still being held as material witnesses[3], all but one Muslim. Many of the people detained had nothing at all to do with terrorism. Similar measures in Australia could clearly be potentially misused and abused, which could lead to massive community tension and be extremely detrimental to the harmony of the community.

It is important to ensure that this does not happen in Australia. The best way to do so is to "raise the bar" for the granting of a preventative detention order.

Recommendation 3: To stop preventative detention orders being used in a manner similar to the "material witness" provisions in the United States, the criteria for the issuing of a preventative detention order should be made as stringent as possible.

Should you require further information please do not hesitate to contact us.

Yours sincerely,

Dr. Waleed Kadous
Co-convenor
Australian Muslim Civil Rights Advocacy Network

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[2] PBS Newshour, *Locked Up,* 11 November 2001, http://www.pbs.org/newshour/bb/terrorism/july-dec01/detainee2_11-8.html

[3] Human Rights Watch