

3 March 2006

ICJ Australia  
Glebe Court House  
2 Talfourd Street  
GLEBE NSW 2037

Dear Eminent Jurists,

**Re: Submission to the ICJ Eminent Jurists Panel**

New Matilda's Human Rights Act for Australia campaign welcomes the opportunity to make a submission to the ICJ Eminent Jurists Panel regarding Australia's framework of anti-terrorism laws. The laws significantly restrict the rights and freedoms of Australian people. This submission focuses particularly on the deficiencies which the recent enactment of these laws exposes in the Australian human rights framework.

## **1. Executive Summary**

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Like many other States, Australia continues to develop policy responses to the threat of domestic and international terrorism. The most recent policy response is the suite of anti-terrorism legislation enacted in December 2005. Unlike many western democracies, however, Australia's policy response has not been informed by a comprehensive human rights framework in the law. The absence of such a framework has resulted in:

- Significant curtailment of legislative and public debate;
- The lack of a coherent framework by which to publicly evaluate the effectiveness and proportionality of the legislation;
- Legislation which may abrogate rights to freedom of speech, freedom of association, freedom from arbitrary detention and freedom of religion;
- The absence of effective checks and balances on executive powers.

Australia's policy response to terrorism has undermined the very rights and freedoms which the anti-terrorism laws purport to secure. This has been partly the result of the absence of an Australian human rights framework.

## **2. Discussion**

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### **A. The Legislative Process was Deficient**

#### **1. The Policy Process**

The legislative process leading up to the enactment of the Anti-Terrorism Act (No. 2) 2005 was grossly deficient.

##### (a) Inadequate Information and Consultation

Following the London Bombings, the Prime Minister called a meeting of the leaders of the states and the territories to discuss the federal government's proposed counter-terrorism package. This meeting took place on 27 September 2005. At this meeting, state and territory leaders were given a briefing on the terrorist threat posed to Australia and they unanimously endorsed the federal government's proposed package. However, they did so with the following guarantee about the new laws:

[they would] be based on clear evidence that they were needed in a democratic society and that the desired effect could not be achieved in less intrusive or onerous ways; be effective against terrorism; conform to the principle of proportionality; comply with all of Australia's obligations under international law; involve rigorous safeguards against abuse, including respecting the principle of non-discrimination; be subject to judicial review; and contain sunset clauses<sup>1</sup>.

The federal government then released a draft of the Anti-Terrorism Bill (No. 2) 2005 to the participants at the summit but directed them to keep it confidential. It also indicated that it would not release the draft Bill until 31 October and that it planned a Senate Committee report to be prepared on the draft Bill by 8 November 2005 – thereby allowing only one week for public scrutiny of these highly controversial new laws. This created a high level of concern in the community about the nature of these laws and the magnitude

of the terrorist threat faced by Australia. New Matilda believes that the government's refusal to release an exposure draft of the legislation and its intention to limit the time available for the Senate inquiry to scrutinize the draft Bill reduced confidence in the government at the very time, and on an issue, in which public confidence in the government is critical.

In response to the government's refusal to release the draft Bill to the public, ACT Chief Minister Jon Stanhope controversially released the draft through his website. Although Stanhope's decision was heavily criticized by the federal government as being reckless, his actions allowed the community including many legal experts an addition sixteen days to consider the draft and contribute to the legislative process. Several of the most egregious aspects of the draft were removed or amended by virtue of the press coverage and the concern in the community, including the 'shoot to kill' provisions<sup>2</sup>.

(b) Parliamentary and public scrutiny

The actions of Mr. Stanhope did not cause the Federal Government to change its approach to transparency in the context of the legislative process. It eventually tabled the Anti-Terrorism Bill (No.2) 2005 on 3 November 2005<sup>3</sup>. Using its control of the Senate it set the due date for submissions to the Senate Legal and Constitutional Committee Inquiry as the 11 October – thus allowing eight days for submissions to be prepared on the Bill, which had been amended between its tabling and the released of the draft by Mr. Stanhope. However, it accepted submissions up until 23 November.

During the eight days, 294 submissions were received. The Committee held hearings on the 24, 27 and 28 of November on Sydney. Presumably due to the limited time available, hearings were not able to be conducted anywhere else in Australia. The government's unwillingness to make the process transparent by refusing to release the draft legislation and limiting the time available to the Senate Committee undermined the transparency that is supposed to characterise our legislative process. While it was all legal, it was not in the spirit of our democratic system and it contributed to increased levels of fear and uncertainty.

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<sup>2</sup> Section @105.23 of draft Bill.

<sup>3</sup> *Anti-Terrorism Bill (No. 2) 2005*, Bills Digest no. 64 2005–06

(c) Legislating irresponsibly – The story of Sedition

The Senate's Inquiry's Report is dated 28 November 2005. The Inquiry contained government members as well as a member of the opposition and two of the minor parties. Among the 53 unanimous recommendations that were made in the report, one deserves further comment. In Recommendations 27 and 28, the committee unanimously called for the Sedition provisions, contained in Schedule 7 of the Bill, 'to be removed from the bill in [their] entirety' and for the Australian Law reform commission to conduct 'a public inquiry into the appropriate legislative vehicle for addressing the issue of incitement to terrorism'. Their concern was based on the impact it would have upon freedom of expression. The Committee Report noted that it had received 'an overwhelming amount of evidence in relation to the sedition provisions' and that '[w]ith the exception of the evidence from the Department and the AFP, this evidence indicated strong opposition to the sedition offences from all sectors of the community'.

Despite unanimous opposition from the community and the committee tasked with reviewing these laws, the government insisted on retaining these provisions and, using its control of both houses of parliament, enacted these laws with only a few small amendments. Most worrying about the enactment of this law was Attorney-General's tacit acknowledgment that the sedition provisions may be imperfect by his agreement to a Australia Law Reform Commission Inquiry into the provisions some three months after the Bill had become law. In a democracy, it is irresponsible and dangerous to enact any legislation that curtails freedom of expression while acknowledging that it may be in need of review and amendment. Governments and legislatures should not be so casual with the legislative process or fundamental human rights. Clearly, parliamentary reform is required to ensure that in legislating to protect our democracy we do not undermine it any further.

(d) Parliamentary debate

Due to the government's majority in both the lower and upper houses of Parliament, the legislation was passed with minimal debate and scrutiny: the 2005 terrorism legislation was passed with less than six hours debate in the Senate, compared to 34 hours debate for the 2002 legislation, when the government did not hold a majority of seats.<sup>4</sup> On December

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<sup>4</sup> See, e.g., Federal Australian Labor Party, 'John Howard's Senate Abuses – Process, Procedure and Convention – the Story since 1 July', <<http://www.alp.org.au/media/1205/msfcfsfcsialoos160.php>>.

5, the government used its control of the Senate – the so-called house of review - to guillotine the Bill and gag the debate.<sup>5</sup>

(e) Conclusion

The process of legislative and public debate preceding the enactment of the legislation was clearly deficient. The deficiency of debate is a problem in itself, since the anti-terrorism legislation ultimately seeks to uphold and protect democracy. Further, the debate's deficiency means that the legislation was not subject to the check which public notification and consultation guarantees.

**2. The Significance of the absence of a comprehensive human rights framework**

A comprehensive human rights framework can form part of a country's constitution or it can take the form of legislation. Australia has neither. Although the Australian Constitution contains a handful of rights, including a limited right to vote (s41), a limited right to trial by jury (s80), freedom of religion (s116), protection against discrimination on the basis of state of residence (s117), acquisition of property on just terms (s51xxxii), these are narrowly defined and usually related only to federal laws. There is also anti-discrimination legislation such as the *Race Discrimination Act 1975* and the *Sex Discrimination Act 1984* but these are confined to this subject area. Australia's legal system is built on the Common Law, which can provide some protections for rights. However, these are not explicit and hence can – and have been – overruled by the parliament with limited informed debate.

A comprehensive human rights framework would have resulted in a far more robust and constructive public debate for the following reasons.

- a. It would remind of the fundamental principles which anti-terrorism legislation purports to protect.** Terrorist acts and the threat of terrorist acts engender fear in the public. This fear typically results in hasty, ill-considered legislation and policy response. In this context, it is easy for legislators and the public to forget the human rights principles which underpin the government and society.

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<sup>5</sup> Ibid

In Australia, claims that the anti-terrorism legislation undermined human rights were swamped by the persistent line that legislation was urgently required to guarantee national security. Indeed there was very little reference to the impact of the new terrorism laws on human rights and the justification for any infringements. Further, the debate has been reduced to ‘persona security’ by the Attorney General on several occasions including shortly after the London bombings when he gave a speech in which he announced that he was ‘examining his obligations under Article 3 of the Universal Declaration of Human Rights’, which that states ‘everyone has the right to life, liberty and security of person’.

The effect of such arguments to induce fear and sensationalise the debate. They never refer to other rights or discuss approaches to reconciling situations in which rights clash. The existence of a comprehensive would alter the nature of debate to bring all rights legitimately into consideration, rather than just a few.

It is instructive to compare the experience of the UK, which has enshrined a set of rights in its *Human Rights Act*. There, public and legislative debate was prolonged, resulting in amendments to the proposed legislation mandating significant public scrutiny of the effect of the Bill on human rights. Indeed, the House of Lords debate on the *Prevention of Terrorism Bill 2005* ran for over 30 hours.<sup>6</sup> Further, many members of the House of Commons and House of Lords drew inspiration from the *Human Rights Act* and the *European Convention on Human Rights* in constructing their arguments.<sup>7</sup>

It is also instructive to consider the response of the ACT, which has an entrenched bill of rights, to the introduction of the legislation. On the announcement of the laws, the ACT Chief Minister commissioned advice into

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<sup>6</sup> BBC News, ‘Government’s Terror Bill Passed’, <[http://news.bbc.co.uk/1/hi/uk\\_politics/4341269.stm](http://news.bbc.co.uk/1/hi/uk_politics/4341269.stm)>.

<sup>7</sup> See, e.g., ‘TheyWorkForYou.com’, <<http://www.theyworkforyou.com/debates/?d=2005-03-10>>.

the human rights implications of the Bill, which led to several amendments of the ACT legislation<sup>8</sup>.

- b. Human Rights frameworks mediate public debate.** The absence of a human rights framework means that Australia has no mechanism to evaluate whether abrogation of human rights is appropriate in a given circumstance. There is no requirement, for instance, that abrogation of rights be proportionate to the mischief sought to be curtailed, a principle the Prime Minister endorsed at the 27 September summit with state and territory leaders.

At present in Australia, the issue is purely political. As a result, it is subject to majoritarian pressures. These majoritarian pressures are enhanced by the weakness of responsible government in Australia – the government controls both houses of parliament meaning that no effective opposition exists and ministerial responsibility is a relic of a bygone era. The effect of this is that there is no coherent, agreed framework to ground public debate. Instead, debate in Australia was dominated by vague, undefined notions such as ‘national security’. This weakens public and legislative debate and reduces the quality of the resultant laws.

Again, it is useful to compare the experience in the UK. The debates that were conducted in the UK community and parliament were informed by the mechanisms in the *Human Rights Act 1998*. Among the mechanisms is the scrutiny offered by the UK Parliament’s Joint Committee on Human Rights which has released several reports evaluating the anti-terrorism legislation by reference to its compliance with the *Human Rights Act*. This report resulted in significant debate and amendment of the legislation. There is also the statement of compatibility that Home Secretary has to make in relation to new bills under s.19(1)(a). The quality of the debate and the awareness of the impact of the laws were significantly higher than that which occurred in Australia.

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<sup>8</sup> Lex Lasry and Kate Eastman, Memorandum of Advice: Anti-Terrorism Bill 2005 (Cth) and Human Rights Act (ACT) 2004, 27 October 2005, <[http://www.chiefminister.act.gov.au/docs/lasry-eastman\\_advice.pdf](http://www.chiefminister.act.gov.au/docs/lasry-eastman_advice.pdf)>

- c. **Australia cannot turn to international law to ground debate.** Despite the fact that Australia ratified the International Covenant on Civil and Political Rights in 1980 and numerous other international human rights instruments, the political debate in Australia surrounding the anti-terrorism legislation was devoid of reference to international law. This is because international laws guaranteeing rights have no legal force unless specifically enacted in domestic law. This absence of legal force means that such human rights instruments lack legitimacy in public and legislative debate and they can be manipulated in public debate by suggesting that one rights is more important than all others.
  
- d. **The absence of a comprehensive human rights framework undermines public confidence in anti-terrorism measures.** Human rights laws ensure that governments are accountable in the development and implementation of anti-terrorism measures. This increases public confidence in those measures.

## **B. The Laws Derogate from Human Rights**

### **1. General**

Australia's anti-terrorism laws grant the executive incredibly extensive powers to detain persons, restrict speech and proscribe organisations. Many of these measures abrogate important human rights, including freedom of speech, freedom of association and movement, freedom of religion and freedom from arbitrary detention. As submitted above, the absence of a human rights framework means the public had no simple avenue to evaluate the proportionality of this abrogation prior to its enactment. Further, the absence of a framework means that politicians, the media, the public and particularly the judiciary have limited ability to evaluate the laws post-enactment.

This limited ability to retrospectively assess whether laws disproportionately abrogate rights is particularly significant given Australia's restricted constitutional human rights framework. This restricted constitutional rights framework manifests itself in various respects. First, though Australian courts have recognised an 'implied freedom of political communication' which is in some respects similar to a right to freedom of speech, the High Court has restricted this freedom to specific, narrow wording of the

Constitutional text<sup>9</sup> and, in recent cases, has been unwilling to broaden the principle.<sup>10</sup> Secondly, the Constitution's express grant of freedom of religion has not been extensively interpreted; therefore, it is unclear the extent to which this freedom will protect human rights. Thirdly, the implied separation of powers at the Commonwealth level has little effect on State courts<sup>11</sup> and creates an incentive for the Commonwealth to minimise oversight of executive actions by Commonwealth courts. Finally, as submitted above, international human rights instruments have no direct legal force in Australia.

This restricted ability of Australian courts to evaluate the human rights implications of Commonwealth legislation is exemplified by the recent High Court decision in *Al-Kateb*.<sup>12</sup> In that case, the High Court, by majority, upheld the right of the Commonwealth government to indefinitely detain an alien. In the virtually identical UK case of *A v Secretary of State for the Home Department*,<sup>13</sup> the court invalidated legislation purportedly allowing indefinite detention by reference to the UK *Human Rights Act*.

Ultimately, some of the abrogations of rights contained in the anti-terrorism legislation may be justifiable and proportionate to the harm they are seeking to prevent. However, the absence of any framework by which to examine its means that there is minimal opportunity to retrospectively evaluate the proportionality of the policy response. This is particularly significant given the paucity of public debate preceding the enactment of the legislation.

## 2. Specific Derogations from Human Rights

- a. **Control orders.** Under the anti-terrorism legislation, the Attorney-General may apply for a control order restricting the activities which a person who is

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<sup>9</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

<sup>10</sup> *Coleman v Power* (2004) 209 ALR 182.

<sup>11</sup> Particularly following *Baker v The Queen* (2004) 210 ALR 1 and *Fardon v Attorney-General (Queensland)* (2004) 210 ALR 50, which together suggest that a function conferred on a state court will only breach the Commonwealth separation of powers in exceptional circumstances.

<sup>12</sup> (2004) 78 ALJR 1099.

<sup>13</sup> [2005] AC 68.

the subject of the control order may engage in. These control orders clearly can abrogate freedom of speech and freedom of movement and association.

- b. Preventive detention.** Under the anti-terrorism legislation, courts may order preventive detention. Clearly, it is of the very nature of preventive detention that it can be abused by the executive to severely abrogate the right to arbitrary detention. It is instructive to compare the UK Terrorism Bill 2005 with the Australian legislation, remembering that the UK Bill is informed by the UK Human Rights Act. The UK Bill does not allow ‘preventive detention’, but instead ‘detention without charge’. The UK Bill is concerned with detaining people for the purposes of assisting criminal investigations, a power which is very similar to pre-existing investigatory powers. In contrast, the Australian Act is concerned with detaining people to prevent or reduce the chances of a terrorist attack. This is a far greater impingement on human rights.
- c. Proscription of organisations.** The legislation allows for the proscription of organisations, where those organisations ‘praise’ a terrorist act. This provision might be used to shut down a place of worship, such as a mosque, if one renegade imam praises a terrorist act. This could be so even if the worshippers did not support or encourage the imam to make that statement. This effectively punishes everyone for the acts of one person. Further, it may be contrary to the rights to freedom of religion and freedom of association.
- d. Seditious.** The anti-terrorism package included a significant modification of Australian seditious laws. Generally, such laws may have the counter-productive effect of driving terrorist speech underground. One significant effects of the modification of seditious laws was to criminalise conduct in which a person is recklessly seditious, even if the person did not intend to be seditious. This may have the effect of criminalising statements which are vague and only indirectly seditious. This may undermine freedom of speech as such extensive regulation may be disproportionate to the harm sought to be prevented.
- e. Forcible obtainment of information.** The anti-terrorism legislation allows an AFP officer to require a person to produce documents where the AFP officer reasonably believes that a person has documents relevant to a serious terrorism offence. This is different to ordinary document-production laws

which allow the forcible production of documents only once information has been given on oath and an issuing magistrate has approved the order. Consequently, this provision may breach the rights to privacy and personal liberty.

### **3. The Executive may abuse the Power Granted**

Even if the specific powers granted and their abrogation of human rights is proportionate to the harm sought to be averted, the policy framework may encourage abuses of power. This is because the existence of broad powers creates opportunities for the executive to exceed even those broad grants of power. Further, the rhetoric surrounding the introduction of the legislation, which emphasised the national security significance of the legislation, may also encourage those who exercise power pursuant to the legislation to be over-zealous. This increases the danger of abrogation of human rights.

### **3. Conclusion**

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Unlike other western democracies, Australia's introduction of anti-terrorism legislation was not informed by a comprehensive human rights framework. This undermined the public and legislative debate preceding the legislation. Further, it severely restricts opportunities to retrospectively assess the human rights implications of the legislation. The effect of this may be to subvert the very human rights principles which the legislation seeks to protect.

New Matilda believes that it is imperative that Australia enacts a comprehensive human rights framework to ensure that our response to terrorism does not further undermine confidence in our system of law and government. New Matilda has drafted a Human Rights Bill that is designed to place a greater emphasis on protecting human rights and improve the process of legislating, while preserving the sovereignty of the parliament. We are promoting it in the community and aim to have it presented a Private Members Bill by the end of 2006. It is included as Attachment A.

Nick Carney

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