



ICJ Eminent Jurists Panel
Terrorism, Counter-Terrorism and Human Rights
International Commission of Jurists
P.O.Box 216
CH-1219 Geneva
Switzerland

9 March 2006

Dear Eminent Panel,

Submission to the ICJ Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights

We write to make a submission to the ICJ Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights regarding the *Anti-Terrorism (No. 2) 2005 (Cth) (the Act)*. The submission is made on behalf of the Sydney Centre for International and Global Law (The Centre) of which we are Associates. The submission does not seek to represent the views of the University of Sydney.

The submission respectfully draws the attention of the ICJ Eminent Panel to the Centre's submission to the Australian Senate Legal and Constitutional Committee's Inquiry (the Inquiry) into the provisions of the Anti-Terrorism Bill (No. 2) 2005 (the Bill) (as attached) and incorporates the substance of the first and last sections (Terrorists and Human Rights and implication for Australia if the Bill becomes law and is considered inconsistent with Australia's obligations under international law respectively) by reference.

Notwithstanding a number of amendments made to the Bill following the tabling of the Inquiry's Report, we remain concerned at the prospects of serious threats to civil liberties and the undermining of the rule of law as a result of the passage of the Act.

The submission addresses the following issues:

- A) The inadequacy of the consultative processes and lack of procedural transparency;
- B) Consistency of the Act with Australia's obligations under international law; and
- C) The State of Emergency Exception under the ICCPR.





A. THE INADEQUACY OF THE CONSULTATIVE PROCESSES AND LACK OF PROCEDURAL TRANSPARENCY

1. We note that the Federal Government did not intend to publicly release the Bill prior to its introduction to the Parliament.¹ However, the Chief Minister of the Australian Capital Territory, Mr. Stanhope, released a copy of the Bill on his website on October 14 2005. The publication of the draft laws on Mr. Stanhope's website hence made possible the public debate surrounding this crucial issue of national significance, even though it did invite the ire of the Prime Minister, "It's important that governments, no matter what political stances you might take, should have the capacity to talk to each other in confidence. And that legislation was given in confidence".²
2. The ACT was subsequently locked out of further negotiations with the Commonwealth in apparent contravention of the intergovernmental agreement signed by the heads of government.³ Mr. Stanhope, in a media release stated that "I am astounded and dismayed that the Commonwealth takes it upon itself to lock out of the process one of the parties upon whose support it relies."⁴ In addition, Mr. Stanhope noted that the first draft of the Bill released by him did not contain any specific confidentiality provisions unlike a subsequent version of the Bill which did not permit Mr Stanhope from publicly releasing it.⁵
3. According to the initial timetable set by the Government, the Bill was intended to be introduced into the Parliament, debated and passed all on the same day – 1 November 2005: Melbourne Cup day. This excessively truncated and inappropriate timetable was opposed by the Opposition and minor parties as well as many in civil society. As a result, the Prime Minister was forced to adjust the schedule with the proviso that the Bill should become law before Christmas 2005.
4. We remain concerned at the lack of transparency and accountability involved in the Government's deliberations on this issue which is inimical to the health of any democracy. But for the actions of Mr. Stanhope, even less time would have been available for public scrutiny of the Bill. We note that equivalent laws in the United Kingdom were published on the UK Home Office Website during the process of drafting.⁶
5. On 3 November 2005, the Bill was referred to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 28 November 2005. The Committee advertised the inquiry in the *Australian* newspaper on 5 November 2005 and submissions

¹ 'Howard on attack over draft bill release'. *Sydney Morning Herald* website (15 October 2005).

² *Ibid*

³ http://www.coag.gov.au/meetings/250604/iga_counter_terrorism.pdf.

⁴ Jon Stanhope, Chief Minister, Australian Capital Territory. *Federal Government Locks ACT Out of Drafting Of Counter-Terrorism Laws*. Media Release, (21 October 2005).

⁵ Jon Stanhope, Chief Minister, Australian Capital Territory. *PM should release Final Terror Draft*, Media Release, (28 October 2005).

⁶ <http://www.homeoffice.gov.uk/security/terrorism-and-the-law/proposed-legislation/>.



were called for by 11 November 2005.⁷ The Committee also published the Bill, the details of the inquiry and other documents on its website as well as notifying approximately 130 organisations of the relevant details of the inquiry.⁸ The Committee only held three public hearings in Sydney on 14, 17 and 18 November.⁹

6. The highly truncated period for public consultation for the final Bill made it impossible for a number of concerned organisations and individuals to provide submissions and/or attend hearings in Sydney.

7. To be sure, where extraordinary circumstances warrant, legislators must have the capacity to enact legislation expeditiously. However, to invoke such capacity, legislators, still less merely the Government, cannot simply assert the existence of such circumstances without demonstration and explanation of sufficient grounds. The Australian Government has never made public the extenuating circumstances it believes have justified its action, beyond numerous general references to the pressing threat of terrorism to Australian interests, and the self-justifying protestation of the Prime Minister on 2 November 2005 that “[t]he Government has received specific intelligence and police information this week which gives cause for serious concern about a potential terrorist threat,” ... and that ... “[t]he Government is satisfied on the advice provided to it that the immediate passage of this bill would strengthen the capacity of law enforcement agencies to effectively respond to this threat”.¹⁰

8. It is our view that any proposed bill of such avowed significance and peculiarity as the Anti-Terrorism Bill ought to be made subject to extended, transparent and genuinely consultative processes; especially if the extenuating reasons offered for its necessity are inadequate.

B. CONSISTENCY OF THE ACT WITH AUSTRALIA’S OBLIGATIONS UNDER INTERNATIONAL LAW

9. The Bill was passed by the Senate on 6 December 2005. It was opposed by the Senators for Democrat and Green Parties. We are of the view that the Act contains a number of provisions which do not appear to be consistent with Australia’s obligations under international law, chiefly under the International Covenant on Civil and Political

⁷ Commonwealth of Australia, Department of the Senate, Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill (No. 2) 2005* (Canberra: Senate Printing Unit 2005) at 1.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Prime Minister, Media Release, 2 November 2005, available at http://www.pm.gov.au/news/media_Releases/media_Release1659.html.



Rights (ICCPR). These provisions of the Act include, *inter alia*, provisions regarding Control Orders, Preventative Detention Orders and Sedition.¹¹

10. As mentioned above, a number of amendments were made to the Bill as it passed through the Senate and the House of Representatives: that persons (and their lawyers) are now to be informed of the foundation upon which control orders are based on. Most were relatively minor, clarification and procedural points, though they did include an easing of the gag imposed on media coverage of the exercise of powers under the Act, and a slight lifting of the bar in terms of what constitutes sedition.¹² None of the amendments, however, impacted in a substantive way on the concerns raised in the Centre's submission to the Senate Inquiry regarding the compliance of the legislative provisions with Australia's obligations under the ICCPR. These concerns still stand therefore.

11. The ICCPR obligations at issue relate to the rights to liberty, fair trial and privacy as set out in Article 9 (right to liberty and security of person and the right to be free from arbitrary detention), Article 10 (right to be treated with humanity including provisions for the protection of children in detention), Article 12 (freedom of movement), Article 14 (right to a fair and public hearing by a competent, independent and impartial tribunal), Article 17 (freedom from arbitrary or unlawful interference with privacy), Article 18 (Freedom of thought, conscience and religion), Article 19 (freedom of expression) and Article 22 (freedom of association).

12. The Act's provision of Executive authority to issue control orders and preventative detention orders (both interim and continuing) give rise to the concerns regarding the ICCPR detailed by the Centre in its November Submission, paras 16-18, 22-27 and 30-37, and regarding Australia's obligations under the Convention on the Rights of the Child (CRC), paras 28 & 29. In summary, these concerns focus on the fair trial, procedural shortcomings of the executive detention processes (including the lowering of evidentiary and standard of proof thresholds), the non-judicial authority, manner and form by which the orders are issued, reviewed and revoked, and the highly restricted access that those detained under the orders have to communicate with their families and legal representatives.

C. STATE OF EMERGENCY EXCEPTION UNDER THE ICCPR

13. The ICCPR provides an important exemption during a state of emergency. Article 4 of the Covenant states as follows:

Article 4 (1)

¹¹ Schedules 4 and 7 of the Act respectively focus on Control orders and Preventative detention orders, and Sedition.

¹² See overview of amendments by Attorney-General Philip Ruddock, Hansard, House of Representatives, 7 December 2005, 181-2.



In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Article 4 (2)

No derogation from articles 6, 7, 8, (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

14. The state of emergency exception permitted under Article 4 allows for derogation from certain provisions of the ICCPR, including Articles 9 and 10. However, for such a derogation to occur, strict conditions need to be met.

15. In its General Comment No. 29 of 31 August 2001, the United Nations Human Rights Committee gave detailed consideration to the circumstances envisaged under the Article 4, ICCPR, States of Emergency exception. The Human Rights Committee emphasized that any derogation “must be of an exceptional and temporary nature”.¹³

16. The Human Rights Committee went on to note in General Comment No. 29:

Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. The latter requirement is essential for the maintenance of the principles of legality and the rule of law at times when they are most needed.¹⁴

17. An initial assessment of Australia’s current state as at the time of consideration of the Bill suggests that these criteria have not been met. There is no evidence of a public emergency which threatens the life of the nation, and, more significantly, as we state above, none of substance has been tendered publicly by the Government. Whilst concerns have been raised about the activities of certain individuals, members of local terrorist cells, or members of international terrorist cells operating within Australia, no evidence has been presented to suggest that these individuals or groups of persons threaten the life of the nation. We note that the Attorney-General, Mr. Ruddock, made no mention of any such threat to the life of the nation in his Second Reading speech of 3 November 2005.¹⁵

¹³ Human Rights Committee (United Nations) *General Comment No.29 States of Emergency (Article 4)* UN Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001) [2].

¹⁴ Ibid

¹⁵ Hansard, House of Representatives, 3 November 2005, 66-68.



We also note that no reference is made to any threats to the nation in the *Explanatory Memorandum* accompanying the Bill.¹⁶

18. We also note that no proclaimed state of emergency has been issued by the government. We contrast the position in Australia with that existing (at the time of writing) in France, where an extraordinary state of emergency was proclaimed on midnight 9 November 2005 in response to a nationwide state of unrest.¹⁷

19. In addition to the requirements for an Article 4 derogation to take place, the Human Rights Committee has also stressed the need for the proposed measures to be limited to the extent strictly required by the exigencies of the situation, thus reflecting a principle of proportionality. The Committee has noted:

This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency.¹⁸

20. In this respect, whilst it is noted that s.4 of the Bill envisages a review by COAG of the anti-terrorism laws at the end of a five year period. This is to be distinguished from a sun-set clause, which would provide either for the expiry of the laws after a defined period of time or give to the Parliament an opportunity to re-enact the legislation.

21. We note that certain parts of the Act anticipate a ‘sun-set’ at the expiry of 10 years.¹⁹ Whilst the insertion of such a provision is welcome, it appears to be grossly disproportionate to any ‘emergency’ that Australia may be facing and does not seem to be directly related to any particular events such as terrorist acts that have taken place within Australia, or have been planned in Australia. Accordingly, there is nothing in the Bill as currently drafted which limits the operation of the envisaged laws to a proclaimed state of emergency consistent with the terms of article 4, ICCPR.

22. Finally, in this regard, it must be noted that article 4 (3) ICCPR provides:

Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated.

¹⁶ House of Representative (Parliament of the Commonwealth of Australia) *Anti-Terrorism Bill (No. 2) 2005 Explanatory Memorandum* (2005).

¹⁷ MSNBC.com “French official wants foreign rioters deported: Curfews imposed in Nice, Cannes during 12-day state of emergency” (9 November 2005) at www.msnbc.com/id/9891709; and ABC Online “State of Emergency declared in Paris” (10 November 2005) at www.abc.net.au/am/content/2005/s1502392.htm.

¹⁸ Human Rights Committee (United Nations) *General Comment No.29 States of Emergency (Article 4)* UN Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001) [4].

¹⁹ Schedule 4, Part 1, s. 104.32; Schedule 4, Part 1, s. 105.53; Schedule 5, Subdivision D, 3UK



23. We are not aware of Australia having provided any notification to other State Parties to the ICCPR through either bi-lateral channels or the United Nations Secretary-General of Australia's intention to derogate from the provisions

D CONCLUSION

24. In this brief submission we have sought to outline the particular difficulties that the legislation faces in respect of Australia's obligations under international human rights law, that is, principally the ICCPR. As such, we query the necessity for, and form of, a number of the extraordinary provisions the statute contains. Important though this merits debate is, what is especially striking about this piece of legislation has been the manner of its making. The need for justification and debate of any legislation of this sort is not simply a matter of counter-balancing the claimed necessity for its expedited enactment; it is an essential element in the justification of such expedition in the first place. "[I]nstant legislation conceived in fear or prejudice and enacted in breach of human rights"²⁰ is not, of course, unknown to democracies, but when the legislation is formulated in a way that denies access to reasons and actively subverts informed debate, then the very precepts of democratic government are endangered rather than protected.

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²⁰ Leslie Scarman *English Law – The New Dimension* (1974), p.20, whilst referring the first wave of UK anti-terrorism legislation in the 1970s enacted in response to “the troubles” in Northern Ireland.