Dr Greg Carne
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10 November 2005

The Secretary
Senate Legal and Constitutional Legislation Committee
Parliament House
Canberra ACT 2600

Dear Secretary,

Re: Submission to Inquiry into the provisions of the *Anti-Terrorism (No.2) Bill 2005*

Thank you for your letter of 4 November 2005 inviting a submission to the Senate Legal and Constitutional Legislation Committee inquiry into the *Anti-Terrorism (No 2) Bill 2005*.

I am a Senior Lecturer in Law in the Faculty of Law, University of Tasmania. I previously gave invited witness submissions (based on written submissions) to inquiries conducted by the Senate Legal and Constitutional References Committee in November 2002 in Canberra and the Joint Parliamentary Committee on Intelligence Services in May 2005 in Canberra and in May 2002 in Sydney, on the ASIO legislation detention and questioning powers.

My written and witness submissions on counter-terrorism legislation are extensively cited in the reports of both committees: in the report of the Senate Legal and Constitutional References Committee: *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters* and in the Joint Parliamentary Committee Report *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*.

This present submission concentrates upon the two most important and controversial elements of the *Anti-Terrorism Bill* - Schedule 4 Control Orders and Preventative Detention Orders. It suggests extensive and detailed amendments to the bill for both forms of orders.

It is a welcome development that some modifications and improvements have been made to the original version of the bill.

However, substantial and significant further modification and the introduction of additional safeguards by Parliament are required in Australia and particularly so for two reasons.

First, unlike other comparable common law jurisdictions, Australia has no bill of rights providing an overarching mechanism in which counter-terrorism legislation must be interpreted in accordance with fundamental rule of law principles and which is subject to court review on those principles.

Secondly, following the history and practice of other counter-terrorism law reform since 2001, further increments and enlargement of powers under the bill will be sought over subsequent months and years.

If the bill is to proceed, it should be extensively amended in keeping with the observations below. Otherwise there is a substantial risk that the very values of Australian democracy sought to be defended from terrorism will in fact be betrayed and destroyed.

I trust that this submission will be of assistance in the deliberations of the Senate Legal and Constitutional Legislation Committee. I also attach a copy of my article on the bill published in *The Canberra Times* on 27 October 2005.

I would be pleased to provide further information or assistance to the Committee.

I am in Melbourne in November and December and can be contacted as per the contact details provided at the top of the first page

Yours faithfully,

(Dr) Greg Carne

SUBMISSION TO INQUIRY INTO THE *ANTI-TERRORISM (No 2) BILL 2005* (CTH)

Senate Legal and Constitutional References Committee

Dr Greg Carne

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DIVISION 104 – CONTROL ORDERS

. MINISTERIAL CONSENT AND MINISTERIAL RESPONSIBILITY DEFICIENT

. S.104.2 Attorney-General's consent: The Attorney-General is not required to achieve the same standard of satisfaction of the merits of the issue as he or she is required to do under the questioning and detention warrant provisions of s.34 C (3) of the *ASIO Act 1979* (Cth). There are much higher threshold requirements and direct, accountable responsibilities for the Minister under s.34 C (3) *ASIO Act 1979* (Cth):

(3) The Minister may, by writing, consent to the making of the request, *but only if the Minister is satisfied*:

(a) that there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a terrorism offence; and

(b) that relying on other methods of collecting that intelligence would be ineffective; and

(ba) that all of the acts (the adopting acts) described in subsection (3A) in relation to a written statement of procedures to be followed in the exercise of authority under warrants issued under section 34D have been done; and

(c) if the warrant to be requested is to authorise the person to be taken into custody immediately, brought before a prescribed authority immediately for questioning and detained – that there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person:

- **(i) may alert a person involved in a terrorism offence that the offence is being investigated; or**
- **(ii) may not appear before the prescribed authority; or**
- **(iii) may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce**

The Minister may make his or her consent subject to changes being made to the draft request

The detention provisions under the *ASIO Act 1979* (Cth) are clearly preventative in purpose: see s.34C (3)(c)(i)to (iii) cited above. The higher ministerial requirement under that Act has been identified as a "strict safeguard".

Such a strict safeguard is absent from the present bill.

In the present bill, there is simply a request for consent of the Attorney-General to the making of an application before an issuing Court. As such, the application for a control order sets a lower application threshold, without *real ministerial responsibility for making an assessment* that the control order *answers the criteria* of substantially assisting in the prevention of a terrorist act or that the person for whom the order is sought has provided training to or received training from a listed terrorist organisation.

In other words, the Minister isn't making a legal assessment as to the quality or reliability of information and intelligence, forming the basis for consent, to seek a control order.

These criteria become the responsibility of (a) the senior AFP member (s.104.2 (2)) and (b) on the balance of probabilities (more likely than not) the issuing Court (s.104.4 (1)(d)).

Accordingly, there is no direct ministerial responsibility for satisfaction of the criteria.

This reality means that all actions of the Attorney-General under the legislation will comport with Prime Minister Howard's doctrine of ministerial responsibility. Under that doctrine, a minister is only responsible for clearly direct actions. Accordingly, there is no ministerial responsibility for role of the Attorney-General in the issuing of control orders, meaning no ministerial accountability to Parliament on this point.

Furthermore, Part 2 – Consequential amendments removes the decisions of the Attorney-General under s.104.1 from the reach of the *Administrative Decisions (Judicial Review) Act 1977*, so the limited role of the Attorney-General's consent is not subject to the extensive grounds of review or reasons for decision available under the *ADJR Act.*

The bill should be amended to institute a s.34 C (3) *ASIO Act* level of direct ministerial accountability.

. NO FIXED TIME LIMIT FOR COURT TO CONFIRM INTERIM CONTROL ORDER

S.104.5 (1)(e) states that, when issuing an interim control order, the Court must "specify a day on which the person may attend the court for the court to (i) confirm (with or without variation) the interim control order; or (ii) declare the interim control order to be void; or (iii) revoke the interim control order".

Accordingly, there is no fixed time limit for review of the interim control order.

The bill should be modified to require Court review of the interim control order no later than seven days after its making. This measure follows ss 3(4) and 3(7) of the *Prevention of Terrorism Act 2005* (UK) requiring review of control orders within 7 days.

. NEED FOR SPECIAL ADVOCATES APPOINTED BY THE COURT TO ASSIST COURT IN TESTING THE SUBSTANCE OF THE AFP CLAIM AGAINST THE RELEVANT CRITERIA

The bill provides for the issuing court to make an interim control order if satisfied of certain criteria on an ex parte basis (s.104.4) and to confirm an interim control order (s.104.14).

Under the ex parte interim control order, the court is reliant upon materials and information provided to it under ss 104.3 and 104.4.

Under the confirmation process for the interim control order, nominated persons under s.104.14 may adduce evidence or make submissions.

A subject of a control order is entitled to a copy of the order and a summary of the grounds on which the order is made: s.104.12.

However, the summary of the grounds on which a control order is made "does not require any information to be included in the summary if the disclosure of that information is likely to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*: s.104.12 (2)

In turn, both sets of proceedings regarding the control orders will be subject to a range of restrictions, controls and prohibitions under the *National Security Information (Criminal and Civil Proceedings) Act 2004*. These matters include restrictions on access to information by representing counsel for the subject of a control order.

Accordingly, the bill should be amended to allow the court to itself appoint Special Advocates to assist the issuing court in properly fulfilling its functions and making assessments according to the relevant criteria, viz:

104.4 (1)(c) the court is satisfied on the balance of probabilities:

- **(i) that making the order would substantially assist in preventing a terrorist act; or**
- **(ii) that the person has provided training to, or received training from, a listed terrorist organisation; and**

(d) the court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act

(2) In determining whether each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, the court must take into account the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances)

Given the uncertainty and predictive characteristics of intelligence and other information upon which the application for a control order will be based, the present process is inadequate for the court to be reliant upon carefully controlled access to that information in an environment where the application of the *National Security Information (Criminal and Civil Proceedings) Act 2004* will be applied in the context of s.104.4 requirements.

The idea for the Special Advocate is to have independent counsel from the independent bar, appointed by the court, on an ongoing basis and then security cleared.

The idea derives from the Special Immigration Appeals Committee and the Proscribed Organisations Appeal Committee in the UK. It is very similar to counsel assisting a Royal Commission.

Special Advocates would provide real assistance to the court in testing the intelligence evidence put forward by having access to all information and documents and a capacity to cross-examine before the Court, most likely in camera.

Such persons would also build up a particular expertise over time.

If the Commonwealth did make legitimate use of provisions of the *National Security Information (Criminal and Civil Proceedings) Act 2004* to control proceedings and\exclude information from the subject of the control order, then there would be a further (or concurrent) procedure to have the Special Advocate test the claim through access to the information and then cross examination. This would be in addition to any facility of counsel representing the subject of a control order or preventative detention order.

The ability issuing courts to appoint Special Advocates is also likely to strengthen the constitutionality of the bill.

. DISCRETION OF ISSUING COURT TO IMPOSE OBLIGATIONS, PROHIBITIONS AND RESTRICTIONS

. Issues arise in relation to the discretion of the issuing Court to impose obligations, prohibitions and restrictions by the control order. For example, in s.104.5 (3)(e) "a prohibition or restriction on the person communicating or associating with specified individuals" is broad enough to include *classes of individuals* or *occupational groups of individuals* eg lawyers as "specified individuals"

This aspect is not sufficiently remedied by the inclusion of s.104.5 (5). Given the significant impact of the control orders, the right to contact lawyers needs to be made clear, specific and unambiguous.

NOMINATION OF "ISSUING COURT"

An 'Issuing Court" includes the Family Court of Australia.

It is proper to ask what expertise the Family Court would be able to bring to counter-terrorism control orders. The inclusion of the Family Court seems tokenistic.

It suggests that (i) the imprimatur of a Court is being used to legitimise a process over which the Court has inadequate effective means to test, to its satisfaction, the matters required under ss 104.3 and 104.4 interim control orders or (ii) there is a lack of confidence regarding judicial independence issues in the control order process which will make most judges and magistrates resistant or reluctant to participate as an "Issuing Court", hence the need to maximise the number of courts and judicial officers participating.

If that is the case, it gives rise to possible Chapter III *Commonwealth Constitution* incompatibility issues, compromising, in reality or perception, the independence of the Court.

. NO INDEPENDENT REVIEWER OF LEGISLATION INCLUDED

There is no inclusion of an independent review process of control orders in the proposed legislation. Contrast the UK provisions in s.14 of the *Prevention of Terrorism Act 2005* (UK), allowing for independent review every 12 months.

The Independent Reviewer under the UK legislation, Lord Carlile QC, has also critically appraised the current UK bill, the *Terrorism Bill 2005* (UK): see Times Online "In full: Lord Carlile report on Terrorism Bill: http://www.timesonline.co.uk/article/0,,22989-1822736,00.html and "Terror watchdog savages new Bill as 'too extensive' at http://www.timesonline.co.uk/article/0,,22989-1822479,00.html

The *Prevention of Terrorism Act 2005* (UK) is the source of the UK control orders and the model and inspiration for the introduction of Australian control orders.

Accordingly, a yearly independent review, by an appointed independent reviewer, of the control orders legislation should also occur.

. INADEQUATE REVIEW OF LEGISLATION AFTER 5 YEARS

. The statement in the COAG Communique Special Meeting on Counter-Terrorism 27 September 2005 that "COAG would review the new laws after five years" is only reflected in Item 4 on page 4 of the bill: "The Council of Australian Governments agreed on 27 September 2005 that the Council would, after 5 years, review the operation of: (a) the amendments made by Schedules 1, 3, 4 and 5; and (b) certain State laws."

Subsection (2) is expressed tentatively and conditionally: "If a copy of the report in relation to review is given to the Attorney-General, the Attorney-General must cause a copy of the report to be laid before each House of Parliament within 15 sitting days after the Attorney-General receives the copy of the report".

There needs to be a much clearer legislative expression and commitment to the review of the legislation.

A better system of review should be included. It would be sensible to replicate the review panel announced for review of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) and other terrorism related legislation (see A-G's media release 12 October 2005 "Independent Committee To Review Security Legislation") comprising a retired Supreme Court judge, a Police Commissioner, the IGIS, the Privacy Commissioner, the Human Rights Commissioner, the Commonwealth Ombudsman and representatives of the Law Council of Australia. That panel should be supplemented by a Muslim Communities representative.

The ambit and scope of the review eg terms, operation and effectiveness of the control orders, should be specified in the legislation.

. INSUFFICIENT REPORTING *GENERALLY* TO PARLIAMENT OF THE USE OF CONTROL ORDERS

Under the *Prevention of Terrorism Act 2005* (UK) s.14, there is a reporting to Parliament requirement by the Secretary of State every 3 months, with an annual review of the orders by an appointed reviewer every 12 months. This contrasts sharply with the annual report mechanism by the Attorney-General under s.104.29 of the bill.

The bill should be amended to require quarterly reporting by the Attorney-General, including a general description of the efficacy of the control order in each case.

. NO REPORTING *SPECIFICALLY* TO A PARLIAMENTARY COMMITTEE OF THE USE OF CONTROL ORDERS

The bill contains no reporting requirements to an individual Parliamentary Committee to monitor and scrutinise the application and operation of control orders.

The bill should be amended to require quarterly reporting by the Attorney General to the Joint Parliamentary Committee on Intelligence Services and a further capacity of that Committee to review and report upon individual control orders.

. SUNSET CLAUSE DEFICIENT

. The sunset clause on the control orders (s.104.32) is set at the unsatisfactorily long time of ten years, rendering it effectively meaningless. A sunset clause should act as a brake on improper executive application, creating a pause for corrective action. The sunset clause should be reduced to five years.

This is a modest proposed amendment in comparison with the UK legislation. Contrast the expiration at 12 months and renewal procedure for control orders required under the UK provision, s.13 of the *Prevention of Terrorism Act 2005* (UK). In addition, the omission of an independent review process means there is no linkage of such a review to the sunset clause.

DIVISION 105 – PREVENTATIVE DETENTION ORDERS

. GENERAL OBSERVATIONS

. As a general observation, preventative detention is here an administrative, not judicial act under the *Commonwealth Constitution.* Such detention is performed on the authority of issuing officers – initially by a senior officer of the AFP, subsequently by a Judge or Magistrate, retired judge or President or Deputy President of the AAT acting in a personal capacity. The maximum length of the detention by the AFP is but one factor, not conclusive, amongst several that provide guidance to its constitutionality under Chapter III requirements.

The fact that the issuing authority for continued preventative detention orders, specified in s.105.2 includes State and Territory Supreme Court judges, Federal Judges and Federal Magistrates, retied judges and President and Deputy Presidents of the AAT does not constitute a form of judicial review.

Much reliance has been placed upon the 48 hours as expressing the limits of Commonwealth constitutional authority to detain, (see COAG Special Meeting on Counter-Terrorism Communique 27 September 2005 and the agreement of the states and territories to include preventative detention for up to 14 days). There is no magic in confining Commonwealth administrative detention to 48 hours. It is not conclusive of constitutionality, nor does it exclude other Chapter III constitutional related issues providing a possible basis for constitutional challenge.

The Preventative Detention Orders provisions appear deliberately drafted to delay, frustrate and hinder access to effective legal representation (this may be incidental to a claimed need to protect information and detention details).

The difficulty in accessing legal representation and extensive restrictions upon such legal representation might well be seen as a practical mechanism to deter applications to federal courts by detainees, including testing the constitutionality of detention. This is complemented by the restricted form of judicial review before Commonwealth courts in s.105.51 of the bill.

These matters need also to be read in context of actually getting a matter before a federal court – the conduct of proceedings in a federal court for a remedy relating to a preventative detention order or for the treatment of the detained person in connection with the order, will in turn be subject to the raft of procedural restrictions in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

. EXAMPLES OF IMPRECISE STATUTORY LANGUAGE REQUIRING AMENDMENT

. S.105.1 "imminent terrorist act" is not, and should be, defined.

. The first object of custody and detention "to prevent an imminent terrorist act occurring" (s.105.1) is not linked (as it should be) in the legislative language to the possession of knowledge, information, intelligence or threat assessments etc available to the AFP member or provided in the facts and grounds in the application to the issuing authority under s.105.7

That is, the assertion that there are "reasonable grounds to suspect that the subject…"(s.105.4 (a) (i) will engage in a terrorist act; or (ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or (iii) has done an act in preparation for, or planning, a terrorist act) is not explicitly connected to the factual material providing a concrete, demonstrable basis for that suspicion.

The subsequent requirement that (s.105.7(2)) that "The application must…(b) set out the facts and other grounds on which the AFP member considers that the order should

be made" is not cross referenced to, nor integrated into, the specifics of reasonable suspicion in s.105.4

. BREADTH OF PREVENTATIVE DETENTION

Careful study of the bill reveals that the reach of the preventative detention provisions is much greater than initial impressions suggest.

. TWO DISTINCT TYPES OF DETENTION EXIST: BEFORE AND AFTER A TERRORIST ACT ie PREVENTATIVE and PRESERVATIVE DETENTION

It is important to understand that the bill applies quite broad criteria for the seeking of what is loosely called a preventative detention order

BEFORE:

. Greater specificity of statutory language and *demonstrability* of reasonable suspicion is desirable as a measure of refining AFP discretion, particularly as the suspicion invokes a factually *very broad* set of *predictive and probability* based events and circumstances under s.105.4 (4): (i) will engage in a terrorist act (ii) possess a thing that is connected with the preparation for or the engagement of a person in a terrorist act or (iii) has done, or will do, an act in preparation for or planning a terrorist act.

AFTER:

. This form of detention is more properly described as "preservative detention". The breadth of s.105.4 (6) is striking:

(6) A person meets the requirements of this subsection if the person is satisfied that

- **(a) a terrorist act has occurred within the last 28 days; and**
- **(b) it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act and**
- **(c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b)**

This provision is drafted so broadly that any innocent person at the site or within proximity of a terrorist act – ie an innocent bystander, victim or person in the wrong place at the wrong time – could be subject to a preventative detention order on the grounds of evidence preservation with some nexus or connection- which need not be direct, immediate or specific – to the terrorist act.

In relation to forensic material, this section potentially applies detention to hundreds of innocent people. This provision should be amended to significantly curtail its breadth.

. SENIOR AFP OFFICERS SHOULD NOT BE ISSUING AUTHORITIES FOR INITIAL PREVENTATIVE DETENTION ORDERS AND FOR PROHIBITED CONTACT ORDERS

Under s.100.1(1) the issuing authority for an "initial preventative detention order" and under s.105.15 (1) and 105.16 (1) for a prohibited contact order, is a senior officer of the AFP.

In constitutional terms, an administrative power to detain or prevent contact is being exercised and the issuing authority under the legislation is conferred upon a senior member of the executive law enforcement administration, upon application from a more junior member of that organisation.

That application does not have to be sworn or affirmed by the AFP member.

Accordingly, the use of senior AFP officers as issuing authorities for initial preventative detention orders and prohibited contact orders completely lacks independence and rigour in scrutinising the application.

This cannot be justified on the basis of comparison with the police arrest powers in terrorism matters under sections 40 and 41 and Schedule 8 of the *Terrorism Act* 2000 (UK). The processes in the *Terrorism Act* 2000 (UK) involves a police criminal investigative, evidence collection and collation and charge model, and *not* a purely preventative model, as is advanced in the Australian bill.

This provision of AFP senior officers as issuing authorities should be replaced so that greater independence is introduced into the issuing authority process for initial preventative detention orders.

Accordingly, the same classes of persons appointed under s.105.2 for continued preventative detention orders – ie persons *other than* AFP officers - should be the issuing authority for both initial and continued preventative detention orders.

The issuing authority of a senior AFP member should be strictly confined to limited, exceptional, emergency circumstances, subject to review at the earliest possible opportunity by a Magistrate or Judicial issuing authority.

This model is both practical and represented elsewhere and recognises that such preventative detention should only be invoked in truly exceptional circumstances.

The starting point of the Canadian preventative arrest power under s.83.8 of the Canadian *Criminal Code* is the warrant authority of a judge, with an *exception* created for *emergency* circumstances ("by reason of exigent circumstances, it would be impracticable to lay an information under subsection (2)…and (b) the peace officer suspects on reasonable grounds that the detention of person in custody is necessary in order to prevent a terrorist activity) for a peace officer to effect an arrest for a limited period of time and based on narrower criteria than in the proposed Australian legislation: see *Criminal Code* (Canada) ss 83.3(1) to (3).

The *Criminal Code* (Canada) preventative arrest without warrant power is strictly controlled, with the person detained having to be brought before a judge within 24

hours and an information laid before that judge: see *Criminal Code* (Canada) ss83.3 (4) to (6).

It should be noted that within Canada, use of the preventative arrest power is seen as *truly exceptional* and in fact never been exercised in the three reporting periods from December 24 2001 to December 23 2004: See Annual Reports: Minister of Justice and Attorney General of Canada and Annual Reports Minister of Public Safety and Emergency Preparedness (Solicitor General): Refer:

http://canada.justice.gc.ca/en/anti_terror/reports.html

Refer also to Canadian Senate: Proceedings of Special Senate Committee on Anti-Terrorism Act Meeting of February 21 2005 (extract of evidence of Canadian Attorney-General and Minister for Justice Hon Irwin Cotler PC MP):

http://www.parl.gc.ca/38/1/parlbus/commbus/senate/Com-e/anti-e/02cv-e.htm?Language=E&Parl=38&Ses=1&comm_id=597

See also Submission 100 to the 2005 Parliamentary Joint Committee on ASIO ASIS and DSD Review of ASIO's Questioning and Detention Powers at:

http://www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/subs.htm

. STRENGTHEN INDEPENDENCE OF NON-JUDICIAL ISSUING AUTHORITIES: NEED TO AMEND BILL AND *ASIO ACT 1979* (CTH)

Persons who do not hold judicial office – namely retired judges who have served in one or more superior courts (s.105.2 (d)) and a person who holds an appointment to the Administrative Appeals Tribunal as President or Deputy President and is and has been enrolled as a legal practitioner of a federal court or of the Supreme Court of a State or Territory and has been enrolled for a least five years (s.105.2 (e)) – have also been made issuing authorities for the purpose of continuing preventative detention orders (s.105.12).

There is a need to introduce measures into the bill to strengthen the independence of these appointees from Executive influence and pressure.

Significantly, both retired judges and the President and Deputy President of the AAT can also be appointed as Prescribed Authorities (ie to supervise questioning and detention under s.34C *ASIO Act 1979* (Cth) warrants: see s.34B (1) and (3) of the *ASIO Act 1979* (Cth).

The present bill contemplates and facilitates persons who are detained under a preventative detention order to be transferred to the *ASIO Act 1979* (Cth) questioning and detention regime under a s.34C warrant, to be supervised by a Prescribed Authority, through release from detention: see s.105.25 of the bill

Both the present bill and the *ASIO Act 1979* (Cth) need to be amended so that DIFFERENT RETIRED JUDGES and DIFFERENT MEMBERS OF THE AAT

perform (a) the issuing authority role under the preventative detention order and (b) the Prescribed Authority Role under the *ASIO Act 1979* (Cth).

Otherwise there is a clear conflict of interests in the roles and access to prejudicial information by a person who has issued an order for preventative detention under the bill then carrying out the role and functions of Prescribed Authority under the s.34C *ASIO Act* questioning and\or detention warrant.

Further safeguards for independence of these non-judicial authorities:

. Appoint retired judges to issuing authority role for a single, fixed term only

. Appoint only members of the AAT who have tenured, or are granted tenured appointments unde the AAT Act to age 65. Fixed term appointees (and this is the present practice for AAT appointees) are more vulnerable to executive pressure for re-appointment and advancement. Tenure as a member of the AAT to age 65 should be written into the legislation as a precondition to appointment as an issuing authority.

. NOMINATED OVERSEEING SENIOR AFP MEMBER AND ISSUING AUTHORITIES FOR CONTINUED PREVENTATIVE DETENTION ORDERS: NOT A PROCESS OF JUDICIAL REVIEW

Some reporting in the media of the review processes for the issue of preventative detention orders has misleadingly and confusingly given the impression of changes in the bill instituting new levels of judicial review of preventative detention.

This is incorrect and the character and limits of review need to be fully comprehended in order to fully appreciate the need for a further range of rigorous safeguards.

. NOMINATED OVERSEEING SENIOR AFP MEMBER

S.105.19 (5) to (9) provides for the appointment of a "Nominated senior AFP member" to oversee the exercise of powers under, and the performance of obligations in relation to, the preventative detention order.

Clearly, that person is acting in an administrative capacity.

Under s.105.19 (6) the nominated senior AFP member must be someone who was not involved in the making of the application for the preventative detention order.

The bill should be amended to ensure that the nominated senior AFP member for the purposes of s.105.19 is an officer of *higher rank* than the senior AFP officer who is the issuing authority for initial preventative detention orders and prohibited contact orders.

. ISSUING AUTHORITIES FOR CONTINUED PREVENTATIVE DETENTION ORDERS: NOT JUDICIAL REVIEW

The fact that the issuing authority for continued preventative detention orders, specified in s.105.2 includes State and Territory Supreme Court judges, Federal Judges and Federal Magistrates, does *not* constitute or form judicial review under s.105.12 (2) which states that "…Section 105.4 requires the issuing authority to consider afresh the merits of making the order and to be satisfied, after taking into account relevant information (including any information that has become available since the initial preventative detention order was made"

It remains an administrative act – reflected in the consent process to appointment as an issuing authority under s.105.2 and in the fact that the appointee is acting in a personal capacity is confirmed under s.105.18 (1) and (2) and "not as a court or a member of a court".

Furthermore, under s.105.12, there is no capacity for the issuing authority to have representations made, hear evidence, submissions or cross examination from the subject of the preventative detention order or representatives of that person.

This omission is oddly inconsistent with the capacity of a person detained under a preventative detention order or their lawyer being able to make representations to the nominated senior AFP member during the course of (but not limited to) an initial preventative detention order, which has been issued by a senior AFP officer.

. INADEQUATE JUDICIAL REVIEW MECHANISMS

The bill continues to provide inadequate judicial review mechanisms. Judicial review was considered as an essential part of the COAG agreement of 27 September 2005: see Communique and Attachment of Council of Australian Governments' Special Meeting on Counter-Terrorism 27 September 2005

The starting point is the limited foundation of available information upon which an application for judicial review of a preventative detention order can occur.

A person taken into custody under a preventative detention order is, under s.105.32, entitled to a copy of the preventative detention order and a summary of the grounds on which the order is made.

Under s.105.32 (2) provision of the summary of grounds "does not require information to be included in the summary if the disclosure of the information is likely to prejudice national security (within the meaning of the *National Security Information* (*Criminal and Civil Proceedings) Act 2004*).

A further point is that again, information availability, access and control applies via the *National Security Information (Criminal and Civil Proceedings) Act 2004*, affecting the ability to substantiate a claim for judicial review. These provisions will apply in proceedings seeking a remedy before a court under s.105.51 (1)

Similarly, an application for review of a decision under the preventative detention provisions cannot be made under the *ADJR Act* : see s.105.51(4) and Part 2 –

Consequential amendments item 25, precluding the obtaining of reasons for the decision.

Consequently, the form of judicial review for a Commonwealth issued preventative detention warrant appears as narrower common law review, of the kind preserved by s.75(v) of the *Commonwealth Constitution* and implemented through the *Judiciary Act 1903* (Cth).

The other forms of review of preventative detention orders in the legislation are also significantly restricted:

. S.105.51(2) excludes jurisdiction of state and territory courts to obtain a remedy relating to a preventative detention order or treatment of a person in connection with an order while the order is in force.

S.105.51 will also exclude the commencement of civil actions for tortious false imprisonment etc whilst the order is in force. Such a measure seems to confirm the general tenor of the legislation's restrictions on legal representation and access to independent courts.

. Applications can be made to the Security Appeals Division of the Administrative Appeals Tribunal for review of decisions relating to a preventative detention order (see s105.51 (5)) but such an application cannot be made while the preventative detention order is in force and it is not judicial review, but instead is administrative review conducted on an ex post facto basis.

. S.105.32 confers jurisdiction on State or Territory Courts for judicial review of preventative detention orders. However, the Commonwealth order is *only reviewable* by a State or Territory Court if a corresponding (and successive) State preventative detention order has been made and the person brings proceedings relating to the State order before the State court.

It is unclear – and the bill is likely to cause different levels, standards and access to judicial review in different states – what criteria and grounds will apply in relation to judicial review, as it is simply stated in s.105.32 (2)(a) "review the application for, or the making of, the Commonwealth order, or the person's treatment in connection with the person's detention under the Commonwealth order, on the same grounds as those on which the court may review the application for, or the making of the state order, or the person's treatment in connection with the person's detention under the State order".

Constitutional questions may also arise as to whether under s.77(iii) of the *Commonwealth Constitution* the Commonwealth Parliament can invest State Courts with federal jurisdiction in this manner.

This criterion for access to judicial review needs to be made broadly based and consistent throughout the Commonwealth and appropriate amendments should reflect this.

. NEED FOR SPECIAL ADVOCATES APPOINTED BY THE COURT TO ASSIST COURT TO TEST ISSUES ARISING IN A JUDICIAL REVIEW APPLICATION

For many of the same reasons set out above in relation to Control Orders, and particularly because of the operation and effects of the *National Security Information (Criminal and Civil Proceedings) Act 2004*, Court appointed and security cleared Special Advocates should be available for utilisation by the courts in assessing judicial review matters and testing claims relating to preventative detention orders.

The need for Special Advocates is confirmed by the narrow bases for judicial review in Commonwealth Courts as set out above.

It is also confirmed by the fact that s.105.32 providing access to judicial review in State courts on the basis described above, under s.105.32 (4) "does not require information to be given to the court, or the parties to the proceedings, if the disclosure of the information is likely to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

. THE REALITY OF DE FACTO INCOMMUNICADO DETENTION

The bill's starting point is that a person detained under a preventative detention order is prohibited from contacting other people (s.105.34).

This prohibition is subject to limited contact exceptions in s.105.35 (family members), s.105.36 (Ombudsman), s.105.37 (Lawyer) and s.105.39 (Persons under 18 and those incapable of managing their own affairs).

Contact with family members, employers, employees and business partners is virtual or remote – by telephone, fax or e-mail.

Those limited exceptions for contact can be *further restricted or eliminated* by the issue of prohibited contact orders: see s.105.40 and Note 2 of s.105.34.

. RIGHT OF DETAINEE TO CONTACT NOMINATED SENIOR AFP MEMBER

S. 105.34 should be amended to allow contact with the Nominated Senior AFP Member as contemplated by s.105.19 and s.105.28 (2)(i).

. INSUFFICIENT CAPACITY OF DETAINEE TO EXPLAIN WHEREABOUTS: NEED FOR LEGAL PROTECTION RE EMPLOYERS AGAINST DISMISSAL AND CENTRELINK PENALTIES

Under s.105.35 (1)(f), a detained person is only entitled to contact nominated persons "by telephone, fax or e-mail but *solely* for the purposes of letting the person contacted know that the person being detained is safe but is not able to be contacted for the time being"

Under s.105.35(2) "the person being detained is not entitled to disclose (a) the fact that a preventative detention order has been made in relation to the person; or (b) the fact that the person is being detained; or (c) the period for which the person is being detained.

Such disclosures are made offences under s.105.41, with a penalty of five years imprisonment.

There is a need to create an offence for an employer dismissing or penalising an employee subject to a preventative detention order. This is particularly so following reform of unfair dismissal laws. The contact permitted with employers prohibits adequate explanation of absence from work.

There is also a need to create an offence for Centrelink penalising a job seeker for breach of obligations unable to be fulfilled because of a preventative detention order. There is no contact permitted with Centrelink.

Similarly, the AFP should be obliged under law to immediately provide a certificate to a released detainee expressed in neutral terms outlining relevant matters and advising of the above prohibitions and penalties on employers and Centrelink, and providing an AFP contact officer for further information.

. DISCLOSURE OFFENCES: INSUFFICIENT EXPLANATION TO DETAINEE

The s.105.35 (2) disclosure offences are insufficiently brought to the attention of the detainee in the obligation of the detaining police officer to inform the person of matters: see s.105.28 (2)(c) merely state "the restrictions that apply to the people the person may contact while the person is being detained under the order".

This leaves the detainee vulnerable to inadvertently stating prohibited matters in contact with family members and being prosecuted – through the admission of monitored telephone, fax or e-mail evidence – for an offence with a five year penalty.

. DISCLOSURE OFFENCES: NO OBLIGATION TO TELL DETAINEE OF PROHIBITED CONTACT ORDER

S. 105.40 states that entitlements of a detainee to contact under s.105.35, 105.37 and 105.39 are subject to any prohibited contact order made in relation to the person's detention.

S.105.41 (1)(d) creates offences for disclosures that the detainee is not entitled to make under the above sections.

However, both s.105.28 (3) and 105.29 (3) do "not require the police officer to inform the person being detained of the (a) the fact that a prohibited contact order has been made in relation to the person's detention; or (b) the name of a person specified in a prohibited contact order that has been made in relation to the person's detention

The lack of an obligation to advise a detainee of a prohibited contact order leaves that detainee vulnerable to the commission of a criminal offence and prosecution under s.105.41 (1) (d).

There should be an obligation to advise a detainee of the contents and operation of a prohibited contact order.

. PROHIBITED CONTACT ORDERS: THRESHOLD FAR TOO LOW AND ISSUING AUTHORITY SHOULD NOT BE SENIOR AFP OFFICER

S. 105.15 of the bill allows an AFP member to apply – in the case of initial preventative detention orders – to a senior AFP officer (as issuing authority) for a prohibited contact order in relation to the subject's detention under the preventative detention order.

. LOW AND GENERALISED THRESHOLD

There is a *very low, generalised threshold* for the grant of a prohibited contact order once a preventative detention order is made – see s.105.15 (4)(b) (the issuing authority) "is satisfied that making the prohibited contact order will assist in *achieving the objectives of the preventative detention order*" – this phrase could mean anything, and is wide open to abuse.

If prohibited contact orders are to be retained, the threshold test must be dramatically increased. As discussed above under "Senior AFP Officers should not be issuing authorities for initial preventative detention orders and for prohibited contact orders", the issuing authority of prohibited contact orders should be removed from senior AFP officers.

Such objectives of the preventative detention order are not individually and specifically (as distinct from generically) identified – do they refer, for instance, to s.105.7 (2)(b) "sets out the facts and other grounds on which the AFP member considers that the order should be made"?

. ISSUING AUTHORITY SHOULD NOT BE SENIOR AFP OFFICER: STANDARD PRACTICE WILL OCCUR TO SEEK BOTH PREVENTATIVE DETENTION AND PROHIBITED CONTACT ORDERS

Such an order, issued by a senior AFP officer, can eliminate all limited exception contacts as outlined above, with the possible exception of contact with the Ombudsman

It is likely that AFP members will adopt the standard practice of simultaneously applying to their command superior officers (issuing authority) for Prohibited Contact Orders whenever there is an application for a Preventative Detention Order and advance generic objectives to meet the criterion of "achieve the objectives of the preventative detention order".

Furthermore, under s.105.15 (4)(b) the prohibition on contact with "a *person* specified in the prohibited contact order" leaves open the possibility of specification of an *individual* or a *class of person* eg an occupational category, for instance, lawyers.

Senior AFP officers should not be issuing authorities, for the reasons discussed under the heading "Senior AFP officers should not be issuing authorities for initial Preventative Detention Orders and for Prohibited Contact Orders".

. PROHIBITED CONTACT ORDERS ABLE TO BE SUPERIMPOSED ON AN EXISTING PREVENTATIVE DETENTION ORDER

S.105.16 allows for a Prohibited Contact Order to be sought for an existing Preventative Detention Order. The test for the issuing authority – again a senior AFP officer in relation to an initial Preventative Detention Order – is whether the prohibited contact order will assist in achieving the objectives of the preventative detention order.

S.105.16 therefore leaves open the possibility of a Prohibited Contact Order being sought during a detention purely because the type of advice received from a contacted lawyer under s.105.34 and monitored under s.105.35 – relating to access to a remedy in proceedings before a Federal Court or a complaint to the Ombudsman – is characterised by the applicant and the issuing authority as a type of communication best prohibited in "achieving the objectives of the preventative detention order" as disadvantageous to their interests.

In its present form, it is wide open to being used to deter or stop effective legal advice.

. RESTRICTION AND EXCLUSION OF LEGAL REPRESENTATION

Whilst s.105.37 (3)(b) identifies the situation where contact with a lawyer is not permitted because of a prohibited contact order, the subsequent provision (s.105.37 (4)) allows an AFP member to give priority to security cleared lawyers in recommending lawyers to the person detained – the requirement of "reasonable assistance to choose another lawyer for the person to contact" (s.105.37).

The reality of few, if any, available security cleared lawyers creates an illusory and meaningless obligation.

Again, it is open to abuse as a means of delaying access to effective legal representation by prioritising the seeking of security cleared lawyers, regardless of their numbers, availability and competence in dealing with specialised issues under the legislation.

In real terms, all the detainee denied access by a prohibited contact order to a particular lawyer or class of lawyers effectively has is an unassisted entitlement to contact a lawyer who does not have a security clearance (s.105.37 (5))

. NO NOTIFICATION TO PERSON DETAINED THAT HE OR SHE IS NOT SUBJECT TO AFP QUESTIONING

S.105.28 (2) should be amended to include that the person detained under the preventative detention order must be informed that he or she is not to be questioned by the AFP whilst being detained under that order (s.105.42(1)), save in accordance with the three purposes set out in 105.42 (1)(a), (b) and (c)

. QUESTIONING UNDER S.105.42 OF PERSON DETAINED SHOULD BE VIDEO-RECORDED WITH LAWYER PRESENT

To ensure that questioning does not exceed the permitted purposes of 105.42 (1) (a), (b) and (c), all such questioning should be videotaped, preferably in the presence of the detainee's lawyer.

. NO CLEAR SPECIFICATION OF DETENTION PREMISES

There is only a discretionary specification of where persons shall be detained under the preventative detention orders: s.105.27(1): "A senior AFP member may arrange for a person (the subject) who is being detained under a preventative detention order to be detained under the order at a prison or remand centre of a State or Territory".

This matter should be made precise in the legislation and arrangements should reflect the fact that the person detained has not even been charged with a criminal offence.

Such specification is a requirement under General Comment 20 on Article7 of the *International Covenant of Civil and Political Rights* (prohibition against torture and cruel treatment or punishment), stating in paragraph 11: "To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognised as places of detention and for their names and places of detention, as well as the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends".

Australia is a party to the *International Covenant on Civil and Political Rights* and has acceded to the Optional Protocol, allowing individual communications to the Human Rights Committee.

. NO PROTOCOLS OF TREATMENT OF DETAINEE

Unlike s.34C (3A) of the *ASIO Act 1979* (Cth), there is no written statement of procedures relating to the treatment and welfare of detainees as a condition precedent to the operation of the legislation.

The lack of a clear specification of detention premises, as mentioned above. The detention premises issue is a further reason for a clear statement of procedures specifying all relevant aspects of detainee treatment.

The requirement of a protocol or statement of procedures should be incorporated as a condition precedent into the operation of the proposed legislation, especially given the incommunicado nature of the detention and the fact that the detainee is likely to be kept in solitary confinement for security and communication reasons.

The lack of a clear specification of detention premises, as mentioned above. The detention premises issue is a further reason for a clear statement of procedures specifying all relevant aspects of detainee treatment

The situation of this AFP preventative detention is different from both *Crimes Act 1914* (Cth) detention for the investigation of a criminal offence and the *ASIO Act 1979* (Cth) questioning and detention powers. That difference – see for example s.105.42 prohibition of questioning of person while detained, except for the purpose of establishing identity – warrants a separate Protocol.

Without a written statement of procedures (Protocol) the s.105.33 provision "Humane treatment of a person being detained" and its key phrases have no guidance within the legislation as to their meaning.

This renders the offence contravention provision (s.105.45) largely meaningless, as well as making the subject matter of complaints to the Ombudsman – particularly through the limited permitted purpose of contact with a lawyer – "the treatment of the person in connection with the order" (see s.105.37(1)(a)(ii), (b)(ii) and (c)(ii) - unclear and uncertain.

Without a written statement of procedures (Protocol) establishing conditions conducive to humane treatment, it is likely that Australia will be in breach of its obligations under Article 10 of the *International Covenant on Civil and Political Rights* and General Comment 21 on Article 10.

. OFFENCES OF CONTRAVENING SAFEGUARDS: FAILURE TO DESTROY IDENTIFICATION MATERIAL

A separate offence should be created under s.105.45 of engaging in conduct which contravenes s.105.44 (3), relating to the failure to destroy identification material taken from a person detained under a preventative detention order, the order having lapsed after 12 months and no proceedings brought or continued in respect of it.

. UPGRADING OMBUDSMAN FUNCTIONS AND POWERS TO EQUIVALENT ROLE OF INSPECTOR GENERAL INTELLIGENCE AND SECURITY UNDER *ASIO ACT* WHEN OVERSIGHTING PREVENTATIVE DETENTION

The role of the Ombudsman under the legislation should be enlarged and spelt out clearly under the legislation, taking as a model the legislated functions of the Inspector General of Intelligence and Security under the questioning and detention powers of the s.34 C of the *ASIO Act 1979* (Cth).

This measure is warranted by the similarly secretive nature of the detention powers and prohibitions against disclosures.

This is particularly important in the present legislation as a human rights safeguard and deterrent to abuses. Unlike the *ASIO Act 1979* (Cth), during this form of preventative detention there is not the presence of an independent Prescribed Authority (a retired judge) and access of lawyers to persons detained is potentially troublesome and more restricted.

Accordingly, the following Ombudsman functions\procedures should be added to the legislation, making the procedures consistent with the safeguards controlling preventative detention under the *ASIO Act 1979* (Cth).

. Consultation with Ombudsman about making of Protocol (Statement of Procedures): (Equivalent to s.34C (3A) *ASIO Act 1979* (Cth))

. Requirement of immediate e-mail or other electronic provision of information by AFP to Ombudsman of the following: (Equivalent to s.34Q of the *ASIO Act 1979* (Cth)).

. Preventative detention order draft request

. Copy of preventative detention order and location of preventative detention of detainee

. Release from preventative detention

. It should be an *offence* under s.105.45 to fail to provide the above information to the Ombudsman in a timely manner.

. Right of Ombudsman or Ombudsman staff to be present at any point of the preventative detention of detainee and taking into custody of the detainee (Equivalent IGIS powers in s.34HAB of *ASIO Act 1979* (Cth)).

. Requirement of Ombudsman to engage in "sample" monitoring of preventative detention orders by selected visits to detainees over any given 12 months of operation of legislation, including observance of adherence to Protocols outlined above. This proposal is equivalent to the actual practice of the IGIS sitting in on the first few ASIO questioning warrants.

. NO INDEPENDENT REVIEW OF LEGISLATION INCLUDED

There is no independent review of the preventative detention orders written into the proposed legislation.

A suitable review panel- of the type announced for review of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) (see A-G's media release 12 October 2005 "Independent Committee To Review Security Legislation") comprising a retired Supreme Court judge, a Police Commissioner, the IGIS, the Privacy Commissioner, the Human Rights Commissioner, the Commonwealth Ombudsman and representatives of the Law Council of Australia, supplemented by a Muslim communities representative, should be written into the legislation.

Such a review should be held at five yearly intervals.

. INDEPENDENT REVIEWER OF LEGISLATION SHOULD BE APPOINTED

This situation of the proposed legislation should be contrasted with s.30 of the *Terrorism Bill 2005* (UK) which requires the Secretary of State to appoint a person to review the operation of the *Terrorism Act 2000* (UK) every 12 months and the laying of a copy of the report before Parliament.

The *Terrorism Act 2000* (UK) (see especially ss 40, 41 and Schedule 8) and the *Terrorism Bill 2005* (UK) are considered the model and inspiration for preventative detention powers being introduced in Australia, even though the UK provisions are still firmly directed around a detain, investigation, collection and collation of evidence and charge model, rather than pure preventative detention.

Accordingly, the lack of an independent reviewer to conduct yearly reviews is a very strange omission in the Australian bill.

. SUNSET CLAUSE INADEQUATE

The s.105.48 sunset clause, providing that the preventative detention orders cease 10 years after commencement is inadequate, the length of time rendering this safeguard virtually meaningless.

A sunset clause is meant to act as a brake on any suggestion of legislation being used arbitrarily and for remedial legislative and administrative action to be taken. Ten years potentially facilitates arbitrary application of the powers being normalised. It should be reduced to five years.

In addition, the omission of an independent review process means there is no linkage of such a review to the sunset clause.

C. CONSTITUTIONAL ISSUES

I have mentioned some constitutional issues under the headings above.

. ADVICE OF COMMONWEALTH CHIEF GENERAL COUNSEL

The fact that there are some significant issues about the constitutionality of the bill's control orders and preventative detention orders is highlighted by an article by journalists Samantha Maiden and Dennis Shanahan on the reported advice of the Commonwealth Chief General Counsel, Henry Burmester QC, "PM's bad advice on detention laws" *The Australian* 26 October 2005, Pages 1 and 10.

In that article, Mr Burmester is quoted on the preventative detention orders as representing a "very untested area of law", "No guarantee as to the validity can be given even as to detention for 24 or 48 hours", "This is a very untested area of the law. Recent High Court cases do not encourage an expansive approach to the scope for executive detention under commonwealth law".

The Committee would doubtless be aided in its inquiry into the bill by obtaining a full copy of Mr Burmester's legal advice.

. SUBSEQUENT MODIFICATIONS IN BILL IN ATTEMPT TO BOLSTER ITS CONSTITUTIONALITY

Subsequent versions of the bill have been modified and added to in obvious attempts to bolster its constitutionality.

***In relation to control orders*, a major change has been the division made between interim control orders (s.104.4), which are dealt with ex parte, and the process of confirming an interim control order (s.104.14) which allows the subject of the control order and their legal representative to call witnesses, produce material and make submissions.**

The making of an interim control order has also had s.104.4 (2) and (3) added, to include consideration of the impact of the obligation, prohibition or restriction on the person's circumstances and to emphasise discretion in imposing obligations, prohibitions or restrictions sought by the AFP in fulfilling the requirement under s.104.4 (1)(d) that "the court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act".

The power over the issue and confirmation of control orders is given to an "issuing court". It is not clear, and is yet to be determined in constitutional terms, whether the issuing of control orders is a judicial function within the meaning of Chapter III of the *Commonwealth Constitution*.

***In relation to preventative detention orders*, the major change in an attempt to bolster constitutionality has been the inclusion under s.105.2 as issuing authorities, serving State or Territory Supreme Court judges, retired judges who served in the superior courts for a period of 5 years and the legally qualified and enrolled President and Deputy Presidents of the AAT.**

This is clearly anticipates submissions inviting the High Court to find these classes of appointees constitutional and not subject to severance from the legislation as unconstitutional, as might be the case with serving Federal judges and Federal Magistrates, these administrative functions, performed in a personal capacity, being seen as incompatible with the holding of Chapter III judicial office under the *Commonwealth Constitution*.

Similarly, the introduction of the nominated senior AFP member to oversee the exercise of powers and receive and consider representations (s.105.19 (5) to (9)), the added requirement for the issuing authority at the stage of the continued preventative detention order "to consider afresh the merits of making the order and to be satisfied, after taking into account relevant information (including any information that has become available since the initial preventative detention order was made) of the matters referred to in subsection 105.4(4) or (6) before making the order"(s.105.12(2)) and the inclusion of review by State and Territory courts (s.105.32) are clearly intended to provide the basis of a textual argument that the legislation's provisions conform with Chapter III requirements, because they are preventative, and not punitive in nature.

Likewise, confining preventative detention to 48 hours is again an attempt to form a textual argument that the purpose of the legislation conforms with Chapter III requirements, in that it is preventative, and not punitive in nature. The origins of this Commonwealth argument go back to original constitutional justifications for the *ASIO Act 1979* (Cth) detention powers: see Submission 167 of Commonwealth Attorney-General's Department "Constitutional Validity Of the Australian Security Intelligence

Organisation Legislation Amendment (Terrorism) Bill 2002 dated 8 May 2002 to Parliamentary Joint Committee on ASIO, ASIS and DSD, citing "the short period of detention under the warrant" (then 48 hours).

. RELIANCE UPON SUCH MODIFICATIONS REFLECTS PARTICULAR COMMONWEALTH APPROACH TO ARGUING CONSTITUTIONALITY

The above modifications made to the bill in an attempt to bolster its constitutionality reflect a particular approach or schema to defending the constitutionality of the legislation. That approach is not necessarily consistent across the High Court's membership, nor appropriate for the particular constitutional powers which would underpin the bill.

That Commonwealth approach is basically to characterise legislation – in this instance, control orders and preventative detention – as being for a purpose *other than* a purpose prohibited by Chapter III. A commonly prohibited purpose is a punitive purpose, so a non-punitive purpose is identified and argued.

That Commonwealth approach is asserted by identifying provisions of legislation as directed to and falling within a nominated constitutional power (containing the constitutional purposes), with the purpose fixed at the time of the taking into detention, the nature of the constitutional purpose as reflected in the legislation not changing through the duration of the detention.

For example, the majority judgments of the High Court in *Al Kateb v Godwin* and *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* effectively and definitively exclude a Chapter III role beyond initial constitutional questions of whether a person is an alien within the meaning of the s.51(xix) power.

In contrast, the Gummow J dissenting position in *Al Kateb,* in identifying the difficulties associated with a punitive or non-punitive distinction as to what is a permissible constitutional purpose, stated "that it is primarily with the deprivation of liberty that the law is concerned, not with whether that deprivation is for a punitive purpose".

It might be then that the Commonwealth's approach (as reflected in the modifications to the legislation) is in fact shaped too much on constitutional powers to detain expounded within the highly differentiated context of the s.51(xix) aliens power.

That is, it might be the case that aliens have less protection from involuntary detention because of the existence of s.51(xix) and the different nature of the purpose therein, from other heads of constitutional power, in this bill, to underpin the control orders and preventative detention orders.

Furthermore, the finding by the High Court in *Fardon v Attorney-General (Qld)* that continuing detention orders made by the Supreme Court of Queensland did not compromise the integrity of the Supreme Court or conflict with the power conferred under the *Commonwealth Constitution* to invest State courts with federal jurisdiction is not necessarily solid authority for extrapolating from the present bill that Federal judges and Federal Magistrates, and State Supreme Court judges, can validly and

constitutionally act as issuing authorities for preventative detention orders. There are a number of points of difference.

First, the *Fardon* matter dealt with State-based preventative detention legislation, on a different topic (sexual offences) and applicable to a detainee who had been convicted of a criminal offence.

Second, the preventative detention order mechanism provided a detailed interim and final order process – quite different in the present bill from the processes for the initial and continued preventative detention order.

Third, the High Court in reading down in a restrictive manner the application of the earlier case of *Kable v DPP*, was commenting upon the differentiated nature of distribution and separation of powers under State Constitutions, with no prohibition of the judiciary exercising non-judicial power, in contrast to a stricter separation of judicial and non-judicial powers under the *Commonwealth Constitution*.

As such, the prohibitions of Chapter III upon the operations of State Courts are lesser and adjusted in comparison with the impact of Chapter III upon the operation of Federal Courts and Federal judicial power, including ultimately, members of that judiciary acting in a personal capacity.

This means that the two types of preventative detention – that in *Fardon* and in the bill – are not analogous for several reasons, ultimately bearing upon constitutionality.

. COMPARISONS WITH CONSTITUTIONALITY OF COMMONWEALTH WAR TIME DETENTION POWERS UNDER THE s.51 (vi) *Commonwealth Constitution* DEFENCE POWER NOT VALID

In wartime, the High Court has upheld the validity of detention measures as essential to the defence of the Commonwealth, forming a secondary aspect of defence as supportive of the main conception of the defence power – see *Lloyd v Wallach* (1915) 20 CLR 299, *Little v Commonwealth* (1947) 75 CLR 94 and *Ex parte Walsh* [1942] ALR 359.

An analogy has been drawn by some commentators suggesting that the detention provisions are constitutionally supportable on a like basis or as an appropriate historical precedent for these measures.

For present purposes, however, that jurisprudence would not support the constitutionality of the detention measures: in the Control Orders (see especially s.104.5 (3)(c) "a requirement that the person remain at specified premises between specified times each day, or on specified days"- which could amount to house arrest) nor in the Preventative Detention Orders.

The first reason for this is that the purposive nature of the defence power means that its secondary aspect – the claimed basis for preventative detention – expands and contracts according to factual circumstances. The present context of these factual circumstances is one of peace in a conventional sense, but with an identified international terrorist threat. The question of whether such a threat arises so as to supply a connection of the legislative measures to the defence power (as a step proportionate, in the secondary

aspect of the power, to dealing with the threat) is a matter for judicial determination based upon judicial notice. The findings of the *Communist Party Case* suggest that such a connection could not be made in the present circumstances.

The second reason is that the jurisprudence dealing with detention supported by the s.51(vi) Defence power pre-dates the judicial exposition of Chapter III of the *Commonwealth Constitution* as a source of limits and controls upon Commonwealth administrative detention and exposition of what is incompatible with Chapter III judicial office, even when acting in a persona designata capacity.

A third reason is that the Commonwealth itself has felt it necessary to support the Control Orders regime under the COAG arrangements by a reference of powers from the States under s.51(xxxvii) of the *Commonwealth Constitution* and the Division 100 Part 5.3 *Criminal Code* arrangements (see also COAG Communique "Commonwealth and States and Territories Agreement on Terrorism and Multi-Jurisdictional Crime, 5 April 2002), and by having the states enact complementary legislation for Preventative Detention Orders for detention beyond 48 hours, a measure intended to skirt around the Chapter III limits and prohibitions on administrative

. SENIOR COUNSEL'S COMPREHENSIVE LEGAL ADVICE ON THE CONSTITUTIONALITY ISSUES

A very comprehensive constitutional analysis of the Control Orders and Preventative Detention Orders has been written by Mr Stephen Gageler SC of the Sydney Bar: "In The Matter Of Constitutional Issues Concerning Preventative Detention In The Australian Capital Territory: Opinion".

The opinion covers in detail matters of general constitutional application outside the ACT as well.

I have provided a copy of Mr Gageler SC's advice on the constitutionality of Control Orders and Preventative Detention Orders (RELEVANT PAGES ARE PAGES 6 to 16) as an attachment to this submission.

I would be pleased to provide any further assistance to the Committee and may be contacted in Melbourne via the details at the top of the covering letter to this submission

Yours faithfully,

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