G. P. SHAW

The Chair
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600

BY EMAIL legcon.sen@aph.gov.au

10 November 2005

Dear Chairperson

Submission on Anti-Terrorism Bill (No 2) 2005 (the 'Bill')

Thank you for the opportunity to provide a submission on this Bill. I am sure all Australians who are aware of the Committee's work are grateful for the scrutiny it gives to proposed legislation, and particularly to a bill with such a grave impact.

My submission will be brief. It is divided into consideration of the legal issues relating to the Bill, and then a discussion of my general concerns as a citizen of Australia.

Please note that **I am providing my postal address and telephone number details in strictest confidence, and I do not wish them to be published for reasons of privacy**. (I have in fact provided my work telephone numbers which need to remain confidential as I have made my submission purely in a personal capacity.) You are welcome to contact me on these numbers if you have any queries.

1. Legal Concerns

(a) Constitutional Invalidity of Preventative Detention Regime

I am gravely concerned that the Bill is at risk of being struck down by the High Court of Australia. In particular, the preventative detention regime of the Bill, regardless of the drafting structure used, is likely to fall foul of Chapter 3 of the Commonwealth *Constitution*. I note the growing number of esteemed legal opinions which have already pointed out that the Bill contravenes the strict separation of powers by involving a member of the federal judiciary in what is, in actual fact, a process that belongs to the Executive arm of government.

Whilst previous cases have held that federal judges, acting in their personal capacity, *may* be appointed to administrative tribunals, there are Constitutional limits on this ability. Those limits are well known: the appointment **must not interfere with judicial independence**: see, for example, *Hilton v Wells* (1985) 157 CLR 57 at pages 73 – 74 per Gibbs CJ, Wilson and Dawson JJ.

The Bill, if requiring a judge, no matter what capacity s/he may be acting in, to effectively impose a sentence of imprisonment *prior* to any adjudication of guilt beyond reasonable doubt, **strikes at the heart of independence.** If a federal judge has assisted in such executive actions, how could the court that judge belongs to be

considered independent enough to fairly determine the guilt of that person should there be a subsequent criminal trial?

More broadly, I would suggest that requiring a judge, or any other decision maker, to incarcerate any person, on the basis of allegations of criminal misconduct *which have not been proven beyond reasonable doubt,* **in itself** violates the requirements of Chapter 3, since the decision maker is being asked to pass sentence prior to making a proper judicial decision.

(b) Policy Concerns

The policy of the Bill has serious flaws. Clear thinking seems to have been abandoned for tough talk that will not achieve the stated aim.

We all agree that terrorism is a scourge that must be prevented. The sedition offences created by the Bill would appear to have deterrence – a form of prevention - as one objective. However, can the imposition of criminal penalties deter a person whose views are so extreme that s/he is prepared to engage in terrorist atrocities? The answer must be 'no'. **Ultimately, our only real means of preventing terrorist attacks is to ensure adequate funding to police and intelligence organisations, for no amount of punitive deterrence will do the job**.

Further, the Bill seems to be heading down the road of restricting freedom of speech, and freedom of association. We are thereby handing the terrorists a victory: for it is our freedom, and our democracy, which they wish to take from us.

No amount of tough laws ever succeeded in reducing Australia's road toll. The only things which have cut the number of deaths on our roads have been improvements in detection technology – like speed cameras and random breath tests – and public information campaigns, like Victoria's TAC advertisements. The same logic applies to the problem of terrorism. Better funding for enforcement agencies is essential, and the Bill is no substitute for this.

2. Personal Concerns

Whilst prevention is the only means of solving terrorism in the short term, dialogue and understanding are the only ways of avoiding conflict in the long run. Allow me to tell a brief personal story.

A month ago I met a Lebanese Australian in a crowded Melbourne shopping centre. We began to discuss Middle Eastern politics. I told him I was fascinated by the history of the area, and remembered a time in 1987 when I had challenged the Israeli Attorney-General on the issue of human rights for Palestinian youths who were being ill-treated at the hands of the Israeli military. I am certainly no fan of Palestinian extremists who resort to violence, but I have always been against injustice, no matter who perpetrates it. I also asked my interlocutor who he thought had assassinated Lebanon's former Prime Minister. Unlike many others, he doubted that there was enough evidence to point the finger at the Syrian government. As we were talking it dawned on me that we were in a very public area, and I began to worry: would others around us think that his pro-Syrian comments made us supporters of terrorism? For a

split second, I regretted having even started the conversation - and the potential impact of this Bill makes me even more hesitant.

But we need to be encouraging dialogue with all members of the Australian community, and not passing laws which stifle it. When people are afraid to talk to their neighbours, as I was on that date, we create a climate of fear which lends itself to the ignorance and hatred which really do spawn terrorism. In the end, it is only by fostering dialogue and understanding that we can help to protect our unique Australian way of life.

I thank you for reading this submission. I would be happy – and indeed honoured – to expand upon it.

Yours faithfully,
GEOFFREY SHAW