Submission to the Senate Legal
and Constitutional Legislation Committee

Anti-Terrorism Bill (No 2) 2005

by

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1. Historical Background

On 15 June 1215 an English monarch placed his seal on a document at Runnymede. The monarch was King John and the document was Magna Carta (Great Charter).

Magna Carta was a sort of Bill of Rights, the very first document to set out in detail the obligations of the monarch and the liberties of “all free men of the Kingdom”. In 1297, a version of the Charter became one of the early English Statutes. It remained in force at the time of European settlement of Australia and therefore became part of our law.

The Charter's current significance is twofold. First, it is the prime historical precedent for the governing legal concept of our society – the Rule of Law – the idea that everyone lives subject to the law and that no one is above it. Its second significance arises from a passage within it. Translated from the Latin it reads:

“No free man shall be seized or imprisoned … or outlawed or exiled except by the lawful judgment of his peers or by the law of the land”.

This passage, apart from being the oldest statutory law now applying in Australia, is the ultimate source of the rights to liberty and fair trial embodied in Article 5 of the American Constitution and in Articles 9 and 18 of the International Covenant on Civil and Political Rights. It is also partly reflected in Chapter III of the Australian Constitution, particularly in Section 80 which requires trial by jury for Federal indictable offences.

Chapter III of our Constitution deals with the "judicial power of the Commonwealth" as against the legislative power in Chapter I and the executive power in Chapter II.

The drafters of our Constitution intended a separation of those powers – in other words, a separation of the functions of the Parliament, the Executive (the Government) and the Judiciary. The aim was to ensure that no one arm had absolute power – it was to be split between the three so that "checks and balances" applied to each.

Chapter III provides for an independent Federal Judiciary with judges appointed to serve up to the age of 70 and removable only by a vote of both Houses of Parliament for proved misbehaviour.

2. Current Detention Powers

State and federal police have never had power to detain people apart from those arrested as a result of a reasonable suspicion of their involvement in a crime. Even where such reasonable suspicion does exist, detention has only been allowable for very short periods before a person must be brought before a court or released.

Seventy-two years ago, the Supreme Court of NSW handed down a decision which is often cited as a precedent for the law of arrest. In that case, *Clarke v Bailey* (1933 SR (NSW) 303), Bailey was arrested for illegal gaming. His lawyer

argued on his behalf that a police officer's prime duty after arrest was to take the accused to court to be formally charged.

The facts were that the police officer concerned had arrested Bailey at his workplace and instead of taking him directly to be processed and then before a court, the officer took Bailey against his will into the bar of a nearby hotel to search him. The Supreme Court held that the deviation to the hotel was unlawful and infringed the principle that the arrested person must be taken without delay and by the most direct route before a justice.

Bailey's lawyer relied successfully on an 1825 precedent in England, a decision of *White v Court* (4 B. & C. 596) which decided that a constable arresting a person on suspicion of felony must take him before a justice to be examined “as soon as he reasonably can”. Chief Justice Phillip Street and his two colleagues awarded Bailey £250 damages (equivalent to a year’s wages) for the illegal police deviation and search.

The decision was referred to with approval by courts many times during the ensuing 70 years, including several times in the 1980s and 1990s by the High Court of Australia. In particular, it was approved in the case of *Williams v The Queen* (1986 161 CLR 278) in 1986, in which Justices Mason and Brennan (both later to become Chief Justice) wrote a joint decision in which they traced the history of the principle.

They first referred to the opinion of the great English lawyer William Blackstone, in his famous 1765 work *Commentaries on the Laws of England*, that “personal liberty was an absolute right vested in the individual by the

immutable laws of nature and has never been abridged by the laws of England without sufficient cause”.

They then quoted Justice Fullagar in a 1955 High Court decision, in which the judge described personal liberty as “the most elementary and important of all

common law rights", and Justice William Deane in a 1982 case, in which he said "it is of critical importance to the existence and protection of personal liberty under law that the restraints which the law imposes on police powers of arrest and detention be scrupulously observed". As in *Clarke v Bailey*, they went on to approve *White v Court* as an early court precedent for the principle.

In a separate concurring Judgment in the *Williams* case, Justices Ronald Wilson and Daryl Dawson referred to the purpose of arrest as being to bring a person before a court so that a charge can be made and dealt with by the judicial process.

In recent years, there has been much debate about precisely how long police should have in which to arrest an accused person, process him at a police station and bring him before a court. As a result of a view that police should have a short period after arrest in which to gather evidence and question an accused, the NSW and other state parliaments changed the law to allow such a period.

Accordingly, the *Crimes Act* (NSW) was amended several years ago to allow police four hours after arrest to bring an accused before a court or alternatively approach a court for permission to extend that period. The period could be extended by no more than a further eight hours, making 12 hours in total. The paper work, processing and court appearance would need to occur within the 4 (or up to 12) hour period, unless the Court had adjourned for the day when the appearance would occur the following morning. If at the end of the period a charge was not laid, the person would need to be released immediately.

That is the present law in NSW, with similar provisions existing in the other States.

What the Government is now proposing is that persons suspected of terrorist offences not be charged at all, but simply detained for up to two weeks. The reason this is so objectionable is that it will not be necessary for police to have any evidence at all of the commission of an offence. A mere suspicion will be enough.

Why is this proposal necessary? It has not been explained.

The danger is that, once any such proposal becomes law, the police would have carte blanche to arrest anyone on suspicion alone and lock them away for up to two weeks without charge. This is unacceptable.

The centuries-old arrest process is essentially a mechanism to bring a person before a court on a charge. The idea that people can be deprived of liberty even though there is no evidence likely to sustain a charge is a strike against two of the most fundamental rights we too often take for granted - the presumption of innocence; and even more importantly, the right to liberty.

It is the preservation of liberty which has most influenced the courts referred to above. They (and previously the legislatures) have ensured that only persons formally charged with the commission of a crime can be deprived of their liberty. Even then you have a right to request bail, which is granted more often than not.

One wonders what Bailey would think of all this, his lawyer having successfully argued that the police could not even take him to a pub to search him on the way to court!

3. The Anti-Terrorism Bill (No 2) 2005

A. Control Orders

These are Court orders applying to persons not charged with an offence but against whom a control order may “substantially assist’” in preventing a terrorist act. Control orders include in some circumstances, confinement to “specified premises” for 12 months, indistinguishable from imprisonment.

The Bill is a second draft and some improvements have been made. In the press, much has been made of the alleged addition of “judicial review'” and other “safeguards” to the Bill. But how do they actually work?

The major change to the Control Order regime is that the initial (interim) Order obtained (without notice to controlled persons) will now need to be confirmed at a court hearing. That is a significant improvement. But on close examination, the provisions for the hearing fall far short of what would normally be expected, given the seriousness of the possible outcome.

The problems with the confirmation hearing are as follows:

- The notice of the confirmation hearing needs to be given only 48 hours beforehand. Controlled persons or their representatives may call evidence and make submissions at the hearing but that right is available only on the “day specified” in the notice. It appears to exclude an adjournment to allow legal advice to be obtained, which is invariably allowed for other hearings;

- The controlled person is not entitled to see the documents upon which the interim Order was obtained, merely a copy of the Order and a summary of the grounds on which it was based. Philip Ruddock misled the Parliament when he suggested in his Second Reading speech that the grounds

themselves will be available. The summary is even further limited by allowing the exclusion of “material likely to prejudice national security.'”

- Although the controlled person will not see it, the court must consider the original request for the interim Control Order;

- The court need only be satisfied on the balance of probabilities rather than the criminal standard of beyond reasonable doubt;

- There is no provision for legal aid for a controlled person (whereas legal aid for serious legal offences is mandatory, if needed);

- There is no requirement that the controlled person or a representative be present when the Control Order is confirmed;

- The provisions are silent on which party bears the onus of proof;

- There is no requirement for any of the police evidence apart from the Control Order and the summary of grounds to be provided to the controlled person prior to the hearing.

If the interim Control Order is confirmed, the controlled person does have a right to apply to the court to revoke or vary the Order at any time thereafter but a similar hearing would take place as above, with the same flawed process. In his Second Reading speech, Mr Ruddock claims that the Act allows the person to apply for the Order to be declared void (from the beginning), at this stage. That is simply not true as can be seen from 104.18 of the Bill.

A controlled person would also be able to appeal the court's decisions but that appeal would be restricted to errors of law.

Overall while these review procedures are better than nothing, they fall far short of what would be required if a criminal charge had been brought against the controlled person in the same circumstances.

B. Preventative Detention Orders

These provisions remain largely unchanged from the first draft Bill.
As before, a reasonable suspicion of involvement in terrorism is enough for a Detention Order to be made by the police (not a court) for an initial 24-hour period. This is *six times longer* than a person charged with an offence can be detained, before an approach to a court is necessary. In addition, after that 24-hour period is over, the Order can be continued by application to a judicial officer or former judicial officer, acting in a private capacity, The Order then may be

continued for a further 24 hours. And the Premiers have agreed to pass laws allowing for the continuation of this detention for up to 14 days!

The first point to make is that this is detention by the Executive (that is, the government) rather than by a court. It is quite open to the government to appoint a retired judge or even induce a sitting judge to resign from a court in order to take up an appointment under these provisions. From the standpoint of human or common law rights, the objection is that this detention power allows the normal four-hour period of detention before a charge has to be laid, to be extended by a factor of 12 — and, in relation to the further extension to be legislated by State parliaments, by a factor of 84!

Noting that no court is involved in the process, there is no appeal. Philip Ruddock trumpets a right of “judicial review” in his Second Reading speech but this arises directly from s75(v) of the Australian Constitution and cannot be excluded by legislation. That right of review is limited to ensuring that the police and judicial or former judicial officers do what they are supposed to do under these provisions. There is no right to any other review within the 48-

hour period. At the insistence of the Premiers, at the end of the initial 24-hour period, the decision-maker is required to make a fresh decision rather than confirm the previous decision. This is only a minor improvement because there is no hearing involved.

There has been no change to the extraordinary and unacceptable provision that contact with a lawyer must be monitored.

Presumably as a result of negotiations with the Premiers, there is a new and welcome provision that suggests that if the detention order is extended under State legislation allowing for detention for 14 days, the detained person has a right in any legal proceedings challenging the State order to also raise the same matters concerning the Federal Order.

At that time, the court is given a discretion to require all of the information that was put before the person who issued the Federal Order to be provided to the parties to the proceedings. This is again subject to exclusion of matters likely to prejudice national security. That right, which will remain unclear until we see the State legislation, obviously does not apply until after the first 48-hour period has expired.

4. Constitutional Invalidity

The manifest deficiencies in the review process for control orders may add to the likelihood of the High Court declaring these provisions constitutionally invalid. This arises from the traditional view of the High Court that the Parliament cannot invest a Federal Court with the power to imprison a person unless the process involves the adjudication of criminal guilt concerning past conduct. Neither of those requirements is necessarily present here. As there is no charge, no proper trial process and no conviction but a Control Order may impose heavy punishment, one would expect the High Court would lean

towards invalidity if it had any doubts. The attitude of newly appointed Justice Susan Crennan may be crucial in this respect.

Preventative Detention Orders are also constitutionally suspect. This partly arises from the possible view of the High Court that detention may only occur

by a federal Court not by police officers or judicial officers acting in a private capacity who must be regarded as part of the Executive.

The Government's probable argument is that under the federal provisions, preventative detention only continues for a maximum of 48 hours and that in those circumstances, exceptionally, the usual constitutional objections should be waived. However, due to the absence of any proper hearing except a very limited right to judicial review, the High Court may take a hard line.

Let’s look at the arguments in more detail.

In the case of *Lim v the Minister for Immigration*, (1992 176 CLR 1) three Judges of the High Court (Justices Brennan, Deane and Dawson) in a joint decision said:

"...the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt."

They also said the Constitution does

"...not permit the conferral upon any organ of the Executive Government of any part of the judicial power of the Commonwealth."

In other words, only a Court may detain anyone and only then persons charged with a crime. The police function is limited to arresting such people for the purpose of, and the time involved in, bringing them before the Court.
In the same case in a separate Judgment Justice McHugh quoted a USA Supreme Court decision as authority for the proposition that:

"Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man shall be imprisoned … save by the judgment of his peers..."

So, why is the Government proposing these laws if they may be struck down by the High Court?

Two of the judges, Justices Bill Gummow and Michael Kirby have in October 2004 in the case of *Fardon v A-G of Qld*, (2004 HCA 46) emphatically supported the Lim case reasoning and may have gone one step further. Gummow (with whom Kirby agreed on this point) said that not only must the detention be by a Court and involve a criminal adjudication but it must also be an adjudication of past conduct. The Government's proposals do not necessarily involve that past element. So far, two votes against.

In the Fardon case, Justice Ken Hayne agreed with Gummow's general reasoning but reserved his opinion on the precise issue. However, he appeared to support the past conduct requirement. So, a likely three votes against.

Next, Chief Justice Murray Gleeson has not expressed a view on the point and could go either way.

What about Justice Ian Callinan? He is seen as a right-winger and is a likely vote for the legislation.

Justice Dyson Heydon may also go for validation. Alright, one to go – the newly appointed Justice Susan Crennan. She was a federal Human Rights Commissioner and may just side with Gummow and company with that sort of background.

So 4-3 at least against preventative detention and control orders may be the result.

5. The Alternative

So what is the alternative to the Bill? How should the terrorist threat be dealt with?

Essentially we are talking here about serious crime, conspiracy to murder and murder itself. These are matters for the police of course, supplemented by hard intelligence from the security services. But why are extravagant new police powers necessary?

Did the police need new and drastic powers to solve the backpacker murders, the Snowtown cases, the Glover granny-killer matters, the recent Skaf gang rapes or earlier initially baffling, multiple homicides? No, is the emphatic answer. Over the last 20 years, technology has delivered police unprecedented aids – DNA testing, advanced chemical analysis, satellite photography and tracking, the internet, directional microphones and voice and face recognition, just to name a few.

The real deficiency here is not with powers but with stretched police resources. Police just need the money to be able to detect, arrest and charge the criminals in the ordinary way. A thousand extra police should do it, surely – spread across all States and Territories. At a marginal cost of say,

$150,000.00 per head per year, it would cost $150 million annually. Small change for an economy running a huge budget surplus.

How much is John Howard proposing to spend to implement his package? Very little on police, and a lot on his secret spy force, ASIO. This is potentially dangerous – until his ASIO statement, we could assume his anti-terror

measures would be rarely used, through lack of resources. Now we know that these measures will have the muscle of greatly increased ASIO intelligence, secret and untestable.

It would be far better to spend the money on the conventional police forces which operate openly and are much more accountable. They should be allowed to get on with the job – of detecting crime, arresting the criminals and taking them before an independent court for trial.

There is no better system.

Let’s forget about control orders and preventative detention.

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