11 November 2005

Submission to the Senate Legal and Constitutional Committee inquiry into Provisions of the Anti-Terrorism Bill (No 2) 2005

Thank you for the opportunity to make a submission to this inquiry. The Bill introduces a number of major changes to existing anti-terrorism legislation, including extensive new executive powers and the creation of new terrorism-related offences. The Bill also criminalises various forms of speech through amendments to sedition laws.

In this submission, we focus on the constitutionality of two aspects of the proposed laws.

1. We examine the extension of the definition of a 'terrorist organisation' to an organisation that 'advocates the doing of a terrorist act' in sections 102.1(1) and 102.1(2) of the *Criminal Code Act 1995*. We explain the potential scope of the restrictions on the speech of organisations entailed in these amendments, and how, for this reason, the amendments may not be supported by Commonwealth legislative power, or that they may be contrary to a constitutionally protected freedom of political communication.

2. We examine the use of Commonwealth and State courts to issue control orders, and individual members of courts and tribunals to issue preventative detention orders. We explain how this conferral of power on courts, or judges acting in their personal capacity breaches the separation of judicial power in the Commonwealth Constitution.

There are several other matters that raise legal, constitutional and public policy concerns. However, given the very short time frame for submissions to the inquiry, we have focused on these two issues. We hope our submission is of assistance in your consideration of the merits of the proposed laws.

Yours sincerely

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EXECUTIVE SUMMARY OF SUBMISSION

A. Definition of a terrorist organisation

1. We explain the extent to which the introduction of a new category of terrorist organisation to organisations that 'advocate terrorism' increases the type of organisation which can be proscribed as a terrorist organisation, and why it is important that the Ministers power to proscribe organisations be subject to adequate legislative and judicial safeguards

2. We explain why the criminalisation of organisations which 'advocate the doing of a terrorist' act might be unconstitutional in Australia and is unconstitutional in comparable Western democracies.

3. We identify public policy reasons based on the constitutional arguments for why the Parliament should not add a new category of organisation to the definition of a terrorist organisation.

B. Separation of powers issues related to the granting of control orders and preventative detention orders

1. We explain why using Federal Courts to issue control orders is unconstitutional.

2. We explain why using judges of federal courts acting in their personal capacity to issue preventative detention orders is likely to be unconstitutional.

3. We explain the rationale for the separation of powers doctrine and why there are very good reasons for the Parliament not to undermine the independence of the judiciary by using them to exercise executive power.

SUBMISSION

A. Definition of a terrorist organisation (Item 9 and Item 10)

1. The potential scope of new definition of a terrorist organisation.

1.1 The amendments in s102.1(2) of the *Anti-Terrorism Bill (No.2) 2005* expand the types of organisation that fit the definition of a terrorist organisation. Under the current law, there needs to be a direct link between an organisation and terrorist related activities, such as engaging in, preparing, planning, assisting or fostering the doing of a terrorist act. Arguably, the proposed s102.1(1A)(a) and (b) maintain this link, and simply extend the type of activities assisting in the commission of a terrorist act to verbal assistance in the form of urging, encouraging and providing instruction.

1.2 However, the proposed s102.1(1A)(c) is of a different character. It adds to the definition of a terrorist organisation that can be proscribed, an organisation which, through its members, expresses a particular type of opinion (i.e. 'praises') the doing of a terrorist act. The praise of the actions of others may have nothing to do with the actions or intended actions of the organisation itself. Through their speech, or the speech of others, persons identified with an organisation can render the organisation vulnerable to being deemed a terrorist organisation by the Minister and opening other individuals to serious criminal liability on the basis of their connection with the organisation. 'Praising the doing of a terrorist act' lacks both a harmful act and an intention to perpetrate the act of the kind normally required for conduct to be considered criminal. It is one thing to ban an organisation which is dedicated to violent political action, but quite another to ban an organisation which, for whatever reason, condones the violent activities of others.

1.3 The elements of the definition in s102(1)1(c) are very broad. In addition to political and religious organisations, they could include within their scope, trade unions, charities and local councils. Also, it is not clear what relationship there needs to be between the organisation and 'members'. For example, do the ill-judged, offensive words of a church leader, local councillor or of a member of the organisation mean that the organisation itself then fits the definition of a terrorist organisation, thus opening its members to a penalty of 15 years imprisonment should the organisation be proscribed?

1.4 There is no definition of 'directly praises' in the Bill, and it is not clear in the context of the Bill what acts or speech the Parliament intends to capture in the concept of praising. Furthermore, the definition of a terrorist act in s100.1(1) is extremely broad and includes the *threat of action*, as well as the doing of action. 'Directly praises' will obviously read in the context of the objects of the act which relate to counter-terrorism measures. Nonetheless, 'praising the doing of a

terrorist act' in s102(1A)(c) could reasonably include expressions of speech which we are confident the Parliament did not intend to amount to 'advocating the doing of a terrorist act', such as:

(a) expressing an opinion on whether the victim of a terrorist act 'had it coming' (cf. the opinion expressed by the boxer Anthony Mundine post Sept 11, 2001);
(b) expressing an opinion that the actions of Australia led to a legitimate grievance in those who perpetrated the terrorist act and that those actions were therefore directly responsible for the commission of the terrorist act;
(c) expressing an opinion on how well planned and coordinated was the doing of the terrorist act; and,
(d) expressing an opinion on how well executed was the doing of a terrorist act, or how well articulated was a threat to carry out an act of serious harm for political, religious or ideological reasons (which is itself a terrorist act).

1.5 The Minister is left with a power to proscribe a wide range of organisations that may be unconnected to terrorist activities. There is no limit placed on the exercise of the Minister's discretion to proscribe an organisation other than that the Minister is satisfied on reasonable grounds that the organisation 'advocates the doing of a terrorist act'. Given the broad terms of the definition of 'advocacy', this requirement will be easily satisfied. Therefore, the only safeguard against the inappropriate proscribing of organisations is that the Minister will exercise his/her discretion responsibly. This is not an adequate safeguard as a matter of law.

1.6 Furthermore, the legislation gives no guidance to the Minister for how to exercise his or her discretion, and thus leaves the discretion to proscribe to be made on subjective grounds based on the Ministers own view of politics or religion, such as a decision to proscribe an organisation that praises the murderous acts of persons on one side of a conflict, and to not proscribe the murderous acts of persons on the other side of the same conflict. The subjective nature of this assessment undermines the authority of and respect for the law.

1.7 For the reasons set out in paragraphs 1.1 to 1.5 above, it is our submission that the definition of a terrorist organisation needs to be significantly narrowed and that the discretion the Minister to proscribe an organisation needs to be subject to a greater degree of scrutiny, either through Parliamentary or judicial review. The serious consequences of proscription of an organisation and the highly subjective assessment required in the decision to proscribe are reasons why scrutiny of the Minister's discretion should be more, and not less than we usually expect from our institutions of government.

2. Constitutionality of the provisions

2.1 The power to ban organisations

In *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, the High Court held that the Commonwealth Parliament did not have the power to ban the Australian Communist Party. The decision rested on a lack of legislative power in the Constitution to pass a law under a particular head of power (s51(vi), the defence power). To hold that there was a want of power, the Court construed the law as one that was not 'appropriate and adapted' to a purpose related to defence under the Constitution. The Commonwealth has broadened the base of its legislative power in relation to anti-terrorism legislation by seeking and being granted a referral from the States in relation to terrorism related matters under s51(xxxvii) of the Constitution. However, the general principle of the *Communist Party case* remains. A law that criminalises organisations challenges fundamental constitutional protections of freedom of speech contained in the rule of law and the separation of powers, both of which limit the extent of Commonwealth legislative power. The underlying constitutional question relates, then, to the extent of the protection of these fundamental principles in the Commonwealth Constitution. With these general principles in mind, there are several ways in which, in our view, s102(1A)(c) would be an invalid exercise of Commonwealth legislative power.

2.2 Infringement of the Implied Freedom of Political Communication

The High Court has held that the Commonwealth Constitution contains within it a freedom of political communication. Expressing opinions about the merits of terrorist activity in the name of a political or ideological cause is, by its nature, political. In *Lange v Australian Broadcasting Corporation*, the Court held that political communication might be limited to speech around the electoral process. Even within this restricted reading of the freedom, because of the breadth of its terms, s102(1A)(c) breaches this freedom: it restricts a particular type of communication at all times, including at times surrounding the electoral process.

2.3 Constitutionality of interferences with political speech in other jurisdictions

As well as being unprecedented in Australia, the degree of inhibition of speech in section 102(1A)(c) would be unconstitutional in comparable Western democracies. In the United States, even speech advocating crime is protected if it is of an abstract nature. The case of *Brandenburg v Ohio*, which was decided in 1969, and is still good law in the US, found that a state may not 'forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action' (395 US 444 (1969) at 447.

In the German case of *Luth*, it was stated that '[We] must reject the view that the basic right [of free speech] protects only the expression of an opinion but not the inherent or intended effect on other persons. It is precisely the purpose of an opinion to produce an "intellectual effect on the public, to help form an opinion, and a conviction in the community" (7 B VerfGE 198 (1958)).

The European Court of Human Rights interprets exceptions to the freedom of expression clause in the European Convention on Human Rights narrowly.

In general, a society which forbids people to express opinions about the circumstances in which violence may be legitimate, irrespective of whether such opinions are a real threat to public safety, is a society which not merely limits but fails to recognise the right to freedom of political speech.

3. Public Policy reasons to reject the extension of the definition of a terrorist organisation

3.1 That speech should enjoy a degree of protection from interference from the state is an essential precondition for a healthy democratic system, and for this reason has obtained a significant degree of constitutional protection. The proposition that it should be a criminal offence to 'praise the doing of a terrorist act' is unacceptable because it places inappropriate restrictions on speech. While the types of speech that might come within 'praising the doing of a terrorist act' might be considered offensive, distasteful or ill-judged, they ought not to be grounds for outlawing an organisation as a terrorist organisation.

3.2 The democratic process only functions effectively if there is healthy debate and the opportunity to criticise government action and speak out against government policy. Without the opportunity to persuade people to a different point of view through reason and rhetoric, people will either submit to the will of the State, or express their preferences covertly through force and violence. Banning speech related to the commission of terrorist offences is a case in point. While people in the Australian community are able to 'praise' the commission of terrorist acts, they have an outlet for their political views, however misguided they might be. The rest of the community is in a position to respond to these views, explain why they are mistaken, and persuade them to alternative points of view. If such speech is criminalised, it simply means it will be expressed out of public view where it cannot be countered by argument and reason, and the State is at greater risk of being undermined by subversive means.

3.3 The explanatory memorandum for the Anti-Terrorism Bill (No 2) 2005 states that the extension of the definition of a terrorist organisation to an organisation that 'advocates' the doing of a terrorist act "recognises that such communications and conduct are inherently dangerous because they could inspire a person to cause harm to the community." This is an inadequate rationale for such a broad and unprecedented restriction on speech of people within organisations and for the imposition of such serious criminal sanctions on members of these organisations.

B. Separation of powers issues related to the granting of control orders and preventative detention orders

The legal regime established in Schedule 4 uses judges and courts in a variety of ways which potentially infringe the separation of powers doctrine. We submit that it is more likely than not that the High Court would find some or all of the provisions to be unconstitutional. This indicates that there is a serious need to reconsider the procedures surrounding the granting of these orders. In reconsidering the procedures, we would urge the Parliament to reflect on why there is a strict separation of judicial power entrenched in the Constitution.

1. Constitutionality of control orders

1.1 The control order regime establishes the Federal Court, the Family Court and the Federal Magistrates Courts as courts for the issuing of control orders (s104.4).

1.2 However, the issuing of an interim control order is clearly an executive function. It is an ex parte application by a member of the Australian Federal Police endorsed by the Minister. No charges are laid and the Court issues an interim control order without hearing from any representative of the person against whom the order is sought. The only thing that makes the order seem judicial is the coercive nature of the obligations, prohibitions and restrictions that it may contain.

1.3 In relation to confirming interim control orders, the subject of the order can be represented in the application before the court. However, the court is still exercising executive power. The subject of the order has not been charged with an offence, and there is no process of trial and punishment. Furthermore, the court need only be satisfied that an order is warranted on 'the balance of probabilities'.

1.4 This is a clear breach of the separation of powers under the Constitution. Federal Courts can only exercise judicial power, and not executive or legislative power. (See, eg, *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.) In *Kable v Director of Public Prosecutions*, it was held that State legislation could not confer a power on a Court to order further detention for a prisoner who had completed their term of imprisonment but was considered to still be a danger to the community because conferring this kind of executive function on a State Court was incompatible with the court's exercise of federal judicial power. In *Fardon v Attorney-General (Queensland)* [2004] HCA 46, it was held that the exercise of a non-judicial function by a State Court under a State law was not incompatible with the exercise of a State Court of federal jurisdiction. However, in *Fardon* the High Court once again upheld that federal courts under Chapter III of the Commonwealth Constitution cannot exercise non-judicial functions, as is clearly the case in the issuing of control orders.

2. Constitutionality of preventative detention orders

2.1 As with control orders, the issuing of preventative detention orders is clearly an exercise of executive power. However, in the case of preventative detention orders, the Bill recognises this fact. Section 105.4 sets out the grounds upon which members of the Australian Federal Police can apply for an initial preventative detention order, which empowers the police to detain a suspect for up to 24 hours. Senior AFP members are the issuing authorities for initial preventative detention orders (s105.8). In addition, the Australian Federal Police can apply for a continued preventative detention order which lasts for up to 48 hours. In this instance, the issuing authority must be a judge, retired judge, or the President or Deputy President of the Administrative Appeals Tribunal. Persons in these positions must give their written consent to being appointed as an issuing authority.

2.2 There are two separate questions about the validity of preventative detention orders. First, there is a question whether serving judges on federal courts can act in their personal capacity to exercise executive power. Note, in this regard, the fact that the proposed law expressly states that judges are acting in their personal capacity simply begs the question. It is a constitutional issue, and not one that can be determined by Parliament. In *Grollo v Palmer* (1995) 184 CLR 348, a majority of the High Court held that judges could act in a personal capacity to hear and determine ex parte listening device applications. In dissent, Justice McHugh argued that such a function was incompatible with the judicial function under Chapter III of the Constitution and therefore infringed the separation of powers doctrine. One reason Justice McHugh argued that the functions were incompatible is of particular relevance to the Anti-Terrorism legislation. He held that one reason for the incompatibility was that Federal Court judges who had granted a listening device warrant might find themselves later sitting on the trial of an accused person for whom they had granted the warrant, and had therefore participated in the criminal investigation that led to their arrest. Even if a particular judge had not granted the application, accused persons would not know whether or not a judge hearing their case had been involved in the criminal investigation process leading to their prosecution. This would seriously undermine the public's faith in the capacity of the court to exercise its judicial power. In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 187 CLR 1 the majority of the High Court applied the incompatibility doctrine more strictly, seemingly overturning the majority position in *Grollo*, and rendering it more likely that Federal Court judges could not act in a personal capacity to grant preventative detention orders.

2.3 Under the proposed Anti-Terrorism laws, it seems conceivable, even likely, that if the granting of a preventative detention order did not lead to the arrest of a person, that it would lead to an application to a federal court for the granting of a control order over that person. The fact that the same judges who had been involved in the executive function of issuing a preventative detention order were then

involved in what is established in the Bill as a judicial function of determining a control order application would seem to be a clear incompatibility of functions as recognised by Justice McHugh in *Grollo*. Furthermore, the executive power being exercised in relation to preventative detention orders is of a different nature from the executive power being exercised in hearing listening device applications. The former infringes a person's liberty, whereas the latter only infringes their privacy. Conventionally, courts may order that persons be detained as part of the criminal justice process of arrest, trial, conviction and sentencing. This is part of their judicial function. The closer an executive function is to a judicial function, the less appropriate it is to have a judge exercising that executive function in their personal capacity. The fact is that judges are being used to assist the executive in order to boost public confidence in the controversial activities of the political branches of government. This is likely to interfere with public confidence in the impartiality of the judiciary by creating an appearance of affinity with the political branches of government, undermining the legitimacy and authority of the courts in the long run. The judiciary enjoys the reputation for independence that it does only because judges maintain a scrupulous distance from politics. The Bill puts that reputation at risk.

2.4 This leads to another possible challenge to the legislation. If judges are removed from the list of persons eligible to issue continuing preventative detention orders, it is left to non-judicial officers (retired judges, etc) exercising an executive power to detain Australian citizens without charge. In *Al-Kateb v Godwin* (2004) 208 ALR 124, the High Court held that the executive had the power to detain non-citizens indefinitely without charge, trial or punishment in a court for the purpose of administering their claims for asylum under the Migration Act 1958 (Cth). However, in *Al-Kateb v Minister for DIMIA* and the earlier decision of *Chu Keng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 a clear distinction was drawn between the power to detain citizens and non-citizens in this regard. It is unclear whether the High Court would find an executive power to detain citizens without charge, trial and punishment constitutional, or whether the power to detain could only be exercised by a court as part of the normal criminal law process.

2.5 An alternative way to frame the legislation would be to leave the issuing of control and preventative detention orders to the executive (with no involvement of courts or judicial officers) and to provide greater access to judicial review of the making of these orders by the executive. This way, the executive has the power to make the orders, and the orders are subject to the proper safeguard of comprehensive judicial review.

3. The reason for the constitutional separation of powers

3.1 The separation of powers is one of the most fundamental protections against excessive executive action within our Constitution. When the State takes coercive action against an individual, the separation of powers ensures that action can only

be taken against the individual if they are in breach of the law, and that the individual will have the opportunity to put a case to an independent decision-maker for why they are not in breach of the law. This is a basic constitutional safeguard. The fact that there is a strong case for arguing that control orders and preventative detention orders are unconstitutional for undermining this safeguard is a good reason in itself to seriously reconsider the merits of the proposed laws.