Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600
Australia

INQUIRY INTO THE PROVISIONS OF THE ANTI-TERRORISM (NO. 2) BILL, 2005

Attached is a submission that the Committee may wish to consider in the course of its inquiry into the Anti-Terrorism (No. 2) Bill, 2005.

For the information of the members of the Senate Legal and Constitutional Committee and its secretariat, I was actively involved in the policy and coordination areas of national counter-terrorism for the best part of 20 years. In some respects, this submission is a distillation of that experience. I was an advisor in the Department of Prime Minister and Cabinet providing advice on, *inter alia*, Defence Force aid to the civil power from 1980 to 1983, and subsequently in charge of the Strategic Guidance and Policy Branch in the Department of Defence with responsibility for Defence policy on the employment of Special Forces and other matters relating to counter-terrorism. I was acting head of the Protective Services Coordination Centre in the Attorney-General's Department in 1989, head of the Security Division (later the Federal Justice Office) in the Attorney-General's Department (responsible for national counter-terrorism and law enforcement policy) from 1990 to 1994, head of International Policy in the Department of Defence from 1996 to 2000, and head of Strategic Policy in the Department of Defence from 2000 to 2001.

I currently practise as an advisor on strategy and risk.

I have prepared this submission in the hope that this policy and coordination background may be of assistance to the Senate Legal and Constitutional Committee.

Should the Committee wish to discuss any aspects of the submission with me, I would, of course, be happy to appear before it. To that end, I can be contacted on (02) 6248 0111 (office) or on 0419 296 263 (mobile).

Yours sincerely,

(Allan Behm)

11 November 2005

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INQUIRY INTO THE PROVISIONS OF THE ANTI-TERRORISM (NO. 2) BILL, 2005

The Senate Legal and Constitutional Committee has invited submissions relating to the Anti-Terrorism (No. 2) Bill 2005. The Bill proposes to amend various federal laws with the stated aim of improving the definition of existing offences and strengthening powers targeting terrorist acts and terrorist organisations. Key features of the Bill include: a new regime to allow for "control orders" to authorise the overt close monitoring of terrorist suspects; a new police preventative detention regime to allow detention without charge where reasonably necessary to prevent a terrorist act or to preserve evidence of such an act; updated sedition offences; new questioning, search and seize powers exercisable at airports and other Commonwealth places; and amendments to information gathering powers available to law enforcement and security agencies. The Bill will also amend the *Financial Transaction Reports Act 1988* to better implement the Financial Action Task Force on Money Laundering's Special Recommendations on Terrorist Financing.

This submission offers the view that, while some of the amendments to existing legislation as provided for in the draft Bill may afford some additional powers to the Commonwealth in combating terrorism, the Bill as currently drafted is ill-considered, unnecessary and will almost certainly be ineffectual. This submission suggests that there are four main reasons why the Bill, as presented to the Senate on 3 November 2005, should not proceed.

- First, the Government has not offered a detailed assessment of the terrorist threat currently confronting Australia that would require a law, such as that envisaged by the Bill, that restricts the freedoms of individuals who may be held on grounds that amount to little more than suspicion but not be charged with criminal offences. It is noteworthy that the Government has not, to this point, made any reference to a detailed assessment of the terrorist threat that it may not have released publicly because of national security considerations.
- Second, the Bill, as drafted, appears to reflect assumptions regarding the nature of global terrorism which do not appear to be based in fact – particularly the assumption that terrorist acts are perpetrated by "organisations" and that the identification and proscription of those "organisations" provides an effective countermeasure to terrorism.
- Third, it is by no means clear what problem the Bill is actually trying to solve. The Bill has been introduced without a statement of the policy imperatives that the proposed legislation seeks to realise, a statement of the policy framework within

which the legislation has such apparent urgency, or a statement of the implications the legislation may have for other policies on which Australian citizens exercise their constitutional, legal and other freedoms.

- Fourth, there is no consideration of international precedent regarding the effectiveness or otherwise of such legislation. In general, such legislation has failed to prevent the occurrence of terrorist acts in other countries, and it may be argued that such legislation may do more to stimulate the commission of terrorist acts by disaffected individuals or groups than to inhibit such acts.

Preliminary Observations

This submission in no way contests the fact that the Parliament, through the Executive Government, has a critical responsibility to ensure the security of Australia and the public safety of its citizens. Indeed, as the swift passage of the Anti-Terrorism Bill (2005) on 3 November indicated, the Parliament takes this responsibility seriously. Successive Parliaments, including this Parliament, have served Australians well in providing appropriate legislative arrangements that maintain and enhance security.

Equally, successive Parliaments have kept a sharp eye on the issue of proportionality. They have worked hard to ensure that legislation is, in fact, an appropriate and proportionate response to the circumstances arising from time to time that demand either new legislation or amendment to existing legislation.

To take an example: it would appear that, on the basis of new intelligence, the Government determined that the legislation embodied in *The Criminal Code Act (1995)* was not adequate to deal with the emergent threat, and that amendment was necessary if charges that might be laid against people planning to commit an act of terrorism were to be effective, and had a better chance of being upheld by the courts. Consequently, the Government introduced The Anti-Terrorism Bill (2005) for urgent passage by both houses. That was a reasonable thing to do.

Members of the Legal and Constitutional Committee would be aware that the question of control orders and preventative detention have been addressed by democratic Governments and Westminster-style Parliaments at various times in the past when threats against the integrity of the state were dire. In general, however, there has been profound distaste for measures that impact on the very liberties that democratic Governments seek to uphold. Perhaps one of the strongest defences of the rule of law was mounted by the Prime Minister of wartime Britain, Winston Churchill, in his correspondence to the Home Secretary in November 1943 concerning the release from detention of Sir Oswald Mosley and Lady Diana Mosley.

> I expect you will be questioned about the release of the Mosleys. No doubt the pith of your case is health and humanity. You might however consider whether you should not unfold as a background the great principle of *habeas corpus* and trial by jury, which are the supreme protection invented by the British people for ordinary individuals against the State. The power of the Executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him judgment by his peers for an indefinite period, is in the highest degree odious, and is the foundation of all totalitarian Governments, whether Nazi or Communist. It is only when extreme danger to the State can be pleaded that this power may

> be temporarily assumed by the Executive, and even so its working must be interpreted with the utmost vigilance by a Free Parliament. . . . Extraordinary powers assumed by the Executive with the consent of Parliament in emergencies should be yielded up when and as the emergency declines. Nothing can be more abhorrent to democracy than to imprison a person or keep him in prison because he is unpopular. This is really the test of civilization.[1]

A few days later, Churchill expanded on his views (and bear in mind that the war was still much in progress and its outcome uncertain) to both the Deputy Prime Minister and the Home Secretary.

> In case there is a debate on an amendment to the Address to terminate 18B [the detention powers], I would strongly counsel the line that we very much regret having to be responsible for such powers, which we fully admit are contrary to the whole spirit of British public life and British history. These powers were conferred on us by Parliament because of the dire peril of the State, and we have to administer them in accordance with the principles of humanity, but all the time we desire to give back these powers from the Executive to Parliament. The fact that we have gained great victories and are in a much safer position makes the Government the more desirous of parting with exceptional powers. . . .
> 2. On no account should we lend any countenance to the totalitarian idea of the right of the Executive to lock up its political opponents or unpopular people. The door should be left open for the full restoration of the fundamental British rights of *habeas corpus* and trial by jury on charges known to the law. I must warn you that departure from these broad principles because the Home Office have a few people they like to keep under control by exceptional means may become the source of very grave difference between us and the totalitarian-minded folk. In such a quarrel Imam sure I could carry the majority in the House of Commons and the mass of the nation. Anyhow, I would try.[2]

Churchill's counsel is as least as relevant to the situation in which Australia finds itself in 2005 as it was to that in which Britain found itself in 1943. And while it might be argued that Mosley was not fomenting terrorism, he did in fact support a form of government that was the complete antithesis to Westminster democracy.

So, What is Wrong with The Anti-Terrorism (no. 2) Bill, 2005?

There is a fundamental difference between amending an Act that is seen to be defective (which is what *The Anti-Terrorism Act 2005* did) and introducing completely new legislation that would give legislative effect to a fundamental but untested re-expression of the rule of law and *habeas corpus*. This particular legislation is designed to bring into being altogether new practices and procedures that amount to significant constraints on individual freedom without charges having been laid or access to proper and early legal representation. The measures proposed are not supported by traditional tests for necessity, nor are they supported by evidence of a clear and present danger that this legislation might resolve to the extent that it would justify restrictions on the freedoms of speech, association and movement. Furthermore, the protections against arbitrary use of the proposed powers, where they do exist, appear to be inadequate. And the proposed changes to the law relating to sedition are quaint.

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[1] W.S.Churchill, *The Second World War, vol. 5 "Closing the Ring"* (London: The Reprint Society, 1954), Appendix F, pp 554-6, from a minute dated 21 November 1943.
[2] *Loc.cit.* From a minute dated 25 November 1943.

This submission does not rehearse positions that would be put with more authority by the Bar Associations and the Law Societies, and other leading legal practitioners. It is important, however, to note that legal and democratic freedoms lie at the heart of what it means to be Australian. In two world wars and other conflicts, over 100 000 Australians have died to defend those freedoms. Australian Parliaments have generally protected democratic and legal freedoms as they legislate, and where they have stepped into uncharted territory (as, for example, in the *Communist Party Dissolution Act 1950*) the High Court has ruled on constitutional validity – and in the case of the *Communist Party Dissolution Act 1950*, the Commonwealth Government's preference was rejected by the electorate at referendum.

The point is an important one: to paraphrase Jefferson, Governments do not make nations more secure by constraining the freedoms of their citizens. Rather, Governments enhance the security of the community by ensuring that values such as respect, tolerance, acceptance of difference and a sense of mutual obligation are central to the national enterprise. Indeed, it may be argued (though it is not the purpose of this submission to do so) that a Bill of Rights would be a more appropriate response to the threat of terrorism than a Bill the net effect of which is to constrain freedoms and substantially reduce citizens' protections against the arbitrary exercise of power, risking the further alienation of those communities within which are to be found groups that are most likely to resort to terrorist acts.

What Precisely is the Threat?

At no point has the Government offered a detailed statement on the nature of the terrorist threat facing Australia, or provided an analysis of how the threat might affect Australia and its people, why terrorist groups might wish to perpetrate acts of indiscriminate violence, what the targets might be, where such events might occur, when they might occur, how they might be done, or how this Bill might serve to reduce the threat. While it would not be the Government's intention to create fear and panic in the community, the community deserves something more than vague assertions reflecting the nation's sympathy for the United States in the aftermath of the 11 September 2001 attacks in New York and Washington, or the nation's sentiments in the aftermath of the bombings on the London underground.

All the available indicators suggest that, besides the localised forms of terrorism in India, Sri Lanka and parts of South America, there is a global threat of terrorism deriving from a virulent form of Islamic radicalism. It is also clear that Islamic fundamentalists have been able to mobilise socially and economically disadvantaged youths in Indonesia, Malaysia, Thailand, the Philippines, Iraq, Israel and, more recently, France. And it has been clear since the attacks on the World Trade Centre in 1993, the 1995 attack on the US military headquarters in Riyadh, the 1998 attacks on the US Embassies in Kenya and Tanzania, the 2000 attack on the USS Cole, and a number of attacks on US citizens since 9/11 that the US is a principal target of this particular form of radical Islamic terrorism.

It is equally clear that the allies of the US – especially those that participated in the "coalition of the willing" in the overthrow of Saddam Hussein – are caught up in the

threat. While the Government has been coy in relating the threat against Australia directly to the threat posed to the US, or to the UK, it would seem probable that Australia's direct support for the war in Iraq has contributed to the threat against Australia. It is noteworthy that countries sharing the "western values" expressed in democratic practice and the rule of law, such as New Zealand, Canada, the Scandinavian countries and Japan, do not appear to be under direct radical Islamic terrorist threat. Neither Ottawa nor Wellington, for instance, have found it necessary to introduce the security measures around their Parliaments that have been introduced in Canberra. Nor have they initiated legislative changes of the scope or magnitude comprehended by the Anti-Terrorism (No. 2) Bill. This is not to suggest that Australia should "follow the leader" or frame its own legislative choices around the views or interests of other nations. What it does mean is that Australia's legislative choices should be calibrated against international practice and standards.

It is significant that the terrorist alert level in Australia has remained unchanged for four years, notwithstanding substantial increases in the information gathering and analytical capacities of the national intelligence, security and police agencies. At medium, the threat level simply reflects the fact that an attack could or might occur. But the threat is not differentiated any further than that.

It would seem, therefore, that the threat, while real, is vague. It is not specific, nor would it appear to indicate that some targets are more likely than others. While Parliament House, the Defence complex and the Department of the Prime Minister and Cabinet, for instance, have been provided with significant upgrades to their static security measures, the High Court, the Department of Foreign Affairs and Trade and the Attorney-General's Department (which is located directly opposite the Department of the Prime Minister and Cabinet) have not. These inconsistencies combine to demonstrate that there is no clear or palpable threat.

The absence of a defined threat where risk and probability have been fully analysed is a powerful reason not to introduce restrictive legislation such as that proposed by the Bill in question. There are major tangible costs, but little in the way of tangible benefits.

Assumptions about the Nature of Global Terrorism

As drafted, the Anti-Terrorism (No. 2) Bill 2005 reveals several assumptions about global terrorism that are dubious to say the least. In particular, the Bill assumes that global terrorism is structured and organised in such a way that the proscription of terrorist organisations and membership of such organisations as constituting a criminal offence will serve to prevent terrorist incidents from occurring.

It is important to recognise that global terrorism is largely unorganised and unstructured. While some groups have formed – Al Qa'ida is the most prominent example, though it should be remembered that it describes itself as a "network" rather than a "group" – the terrorist cells that provide the main perpetrators of random acts of violence are no more than temporary associations that have no name, no history

and no future once the incident has occurred. They are ephemeral and evanescent, which is why they are so difficult to identify and contain.

To the extent that they operate cooperatively or collusively in any sense, the various terrorist cells around the world are more like franchises than branch offices. They are loosely connected at the individual level through attendance at training courses on bomb-making and other terrorist techniques, and participation in indoctrination courses to strengthen ideological resolve.

The draft Bill also seems to assume that individual terrorists will come to notice through their association with extremist groups, their attendance at sermons by radical clerics, or their participation in overseas terrorist training courses. While these factors are already taken into account by ASIO and the State police forces in their current operations under existing law, international experience would suggest that the greatest danger to the public comes from those who never come to notice: those who have not received formal training in terrorist techniques, those who are not members of identified groups, and those who do not attend Friday prayers at the more extremist mosques. Indeed, it is more likely that future terrorists will be "cleanskins" who are instructed not to draw attention to themselves and who have not come to the notice of the intelligence or law enforcement agencies.

What makes the present-day form of terrorism so difficult to deal with is its amorphous nature and the fact that its ideological base is so powerful that individuals are prepared to kill themselves in order to conduct a successful attack. That has been the experience of Israel with the suicide bombings in Tel Aviv, and of Indonesia with the suicide bombings in Jakarta and Bali. Radical Islamic terrorism is essentially different from the forms of terrorism that have characterised the West's experience during the past 50 years or so. Members of the Red Brigades, Baader-Meinhof, the Weathermen and the Shining Path, for example, had a very strong sense of their own self-preservation. But a new form of terrorism demands new remedies, and these necessarily focus on intelligence and law enforcement resources rather than new legal powers of doubtful utility.

It is always the case that legislation cannot be a substitute for effective intelligence gathering and law enforcement arrangements. And it is always the case, as the UK discovered in Northern Ireland, that even the most constraining legislation would not deter those who are prepared to give up their lives in order to attain the terrorist mission. As the UK's more recent experience of the London underground bombings illustrates, MI5 and Scotland Yard did not know how to identify probable terrorists.

Australia has in place laws that provide the intelligence and law enforcement agencies with powers appropriate to the problem. The intelligence and police operations conducted so successfully in Sydney and Melbourne on 8 November 2005 give evidence of that fact. What the nation lacks is sufficient intelligence and surveillance resources, adequate static security measures, and a public that is educated on public safety issues. Nor are Australia's response capacities sufficiently robust to provide the best possible incident management and response. Rather than enacting laws that significantly restrict or curtail basic freedoms, the Parliament may be better advised to ensure that emergency response procedures actually serve to reduce the number of casualties generated by a terrorist incident, that centralised trauma centres are staffed

by experienced trauma surgeons and theatre staff, that effective evacuation plans are in place, and that preventive security measures in bus terminals and rail stations are at least comparable with those in place at airports.

The modern phenomenon of global terrorism depends for its success on the execution of extremist ideology by individuals who are prepared to take any risk. While robust legal structures are clearly necessary, they will never be sufficient to deter or prevent terrorist incidents from occurring. As noted previously, the law must be supported by effective intelligence and law enforcement capacities. But, more than that, modern global terrorism will only be defeated when two other critical interventions are in place: a clear and forceful restatement and defence of the fundamental values which connect modern democracies around the world; and constant, focused and effective international collaboration concentrating on the expansion of personal, civil, political and economic rights in those countries – especially the Islamic ones – that do not enjoy such rights. The international democratic community needs to advance the rights of women and children, access to education, access to information and international communications, employment growth and targeted economic investment that serves to address the fundamental causes of political and economic alienation among young Muslims. This is an arena in which Australia, by virtue of its own history and its credentials as a consistent international performer, could be particularly effective.

The Policy Framework

The most worrisome feature of the proposed legislation is that there appears to be no overarching policy framework within which the legislation is situated. The absence of a policy framework suggests that the proposed legislation is little more than a partial response to a problem that is only partly understood. The Second Reading Speech is entirely silent on both the policy considerations that should underpin the Bill and the policy objectives that the Government might be seeking to achieve through the measures in the Bill. While Governments are usually circumspect in revealing all the factors that might contribute to the shaping of a major policy initiative, significant legislation is almost invariably introduced by a comprehensive and well argued statement of the key policy drivers.

The Second Reading Speech supporting the introduction of this Bill announces the Government's intention "to ensure that we have the toughest laws possible to prosecute those responsible should a terrorist attack occur". Yet this objective is evidently at odds with the apparent intention of the Bill, which is to **prevent** such attacks from occurring. As noted above, the Bill is purportedly designed to prevent the realisation of imprecise threats rather than to prosecute the perpetrators after the event. The Commonwealth already has the power to do that.

The Second Reading Speech makes much of the fact that there has been considerable consultation with the States and Territories – two meetings of the Council of Australian Governments (COAG), various consultations between officials and telephone hook-ups between the Prime Minister and the Premiers/Chief Ministers. Consultation, however, is only as meaningful as the policy substance of the

discussions, and given the short duration of the meetings there could not have been much policy debate.

The Second Reading Speech goes on to cover some of the matters that are dealt with in greater detail in the Explanatory Memorandum. While, for reasons noted above, its treatment of control orders and preventive detention is unsupported by an analysis of the threat or a statement of the policy issues that might necessitate such orders, it is the treatment of sedition that is the most puzzling. The Second Reading Speech lacks any cogent argumentation to support strengthening such archaic provisions as the sedition offence. Sedition, like treason, is hard to identify and even harder to prove. Although it is difficult to imagine that any DPP would seriously entertain charges against people who are critical of the Government, of the Monarch or even of Australia's current political system, the invocation of something that sounds more like the Star Chamber than a 21st century approach to vigorous and sustained debate has, not surprisingly, aroused suspicion is some quarters.

Instead of an offence as vague as "sedition", the Bill might have done better to make any incitement to injure people or damage property for political or criminal purposes (bearing in mind that terrorism is actually a crime) a criminal offence in itself. This would be consistent with, for example, the casting of racial slurs in the *Racial Discrimination Act 1975*.

Nor are the policy foundations for the further strengthening of law enforcement and ASIO powers touched upon at all. There is no indication of any deficiency in the powers currently available to the law enforcement agencies and ASIO, and there is no argument as to how precisely an extension of stop, question and search powers will contribute to the Government's declared aim to prevent terrorist acts from occurring. The intelligence and police operations conducted with such effect on 8 November 2005 in Sydney and Melbourne demonstrate that the relevant agencies already have adequate powers. What has become clear during the past few years – and Mr Philip Flood drew attention to this fact in his July 2004 report on the capacities and performance of the Australian Intelligence Community – is that the national intelligence gathering and assessment agencies and police forces need more resources rather than more powers.

What might be some of the policy issues that the Second Reading Speech might have addressed? *Prima facie*, there are at least seven portfolios that would have substantial policy interests in the proposed legislation: Attorney-General's, Immigration, Multicultural and Indigenous Affairs, Human Services (and Centrelink), Foreign Affairs, Transport, Defence and Prime Minister's.

Without pretending to be exhaustive, the following are some of the indicative policy issues that might have been dealt with in bringing the proposed Bill to the Parliament, and discussed in the Second Reading Speech:

- *Attorney-General's*: policy issues would include issues of jurisprudence; legal precedent; robustness in the face of legal challenge; judicial review procedures; legal and operational implications for AFP and ASIO operatives; accountability demands on the AFP and ASIO; implications for the PSCC; implications for

broader national law enforcement policy and coordination; community safety matters.

- *DIMIA*: policy issues would include the affect of the proposed legislation on the Islamic community in Australia; the availability of other social policy interventions to reduce the risk of social and economic alienation within the Islamic community; implications for the border protection regime; implications for law enforcement in other communities (e.g. the impact of the "three strikes and you're out" sentencing policy on the indigenous community in the Northern Territory, and whether control orders and preventative detention are any more likely to work); implications for immigration policy (especially as it relates to immigration from Islamic countries).
- *Human Services (Centrelink)*: policy issues would include economic support and social welfare for those who might be subject to control orders or preventative detention; social services access to persons so controlled or detained; family support matters.
- *Foreign Affairs*: implications for the conduct of foreign relations with Islamic countries, especially Indonesia and Malaysia; implications for Australia's policy and position on human rights matters in the relevant international organisations; implications for Australia's international image.
- *Transport*: implications for aviation and airport security; implications for land transport security; implications for sea transport security; implications for transport infrastructure security; implications for the small Islamic communities in regional Australia.
- *Defence*: implications for Defence Force aid to the civil power; implications for special forces; implications for other ADF units that might cooperate with or assist State law enforcement agencies; implications for DSD and DIGO.
- *Prime Minister and Cabinet*: implications for top-level political and policy coordination between the Commonwealth and State Governments; implications for national security policy development and coordination; implications for broader policy coordination within and between Commonwealth agencies.

While all Governments are entirely within their rights in deciding how much (or how little) of the policy framework they might wish to include in any Second Reading Speech, it is noteworthy that, with respect to a matter that has aroused so much public interest and comment from so many interested groups, so little policy detail has been provided on a question of such profound policy significance.

International Experience

Put in the baldest way, international experience suggests that legislation of the kind envisaged by the draft Bill simply does not work. What does work is a combination of good intelligence, good policing, good response capabilities and robust criminal laws that ensure that convictions are secured and appropriate penalties imposed. It is important to note that the US, which arguably faces a more direct and substantial threat than does Australia, has not sought to introduce legislation as restrictive as that proposed by the draft Bill. There are, of course, constitutional impediments to such legislation in the US. But, more than that, the US could not help but have noticed that restrictive laws did not work in Northern Ireland.

This submission accepts that it is not the intention of the draft Bill to single out any particular individuals or communities for special legal attention. Yet it is already clear that an unintended consequence of the Bill is a heightened level of concern within the Australian Islamic community that it will be subject to discrimination and the abuse of power without effective opportunity to obtain redress. Given that the cause of the current concern regarding possible terrorist incidents in Australia is Islamic radicalism, it is hardly surprising that Muslim individuals would be prime targets in the application of the draft Bill. But international experience also suggests that legislation that singles out members of a particular community is more likely to radicalise elements of that community than to integrate them more fully within the national polity. That certainly has been the experience in the UK, Europe and North America. While it is a matter for Government decision whether the risks and consequences of this particular Bill are outweighed by the benefits that the Bill might deliver, it seems that the necessary policy analysis has not, in fact, been undertaken.

In place of a reliance on restrictive legislation, international experience and practice would suggest that anti-terrorism is best effected through a combination of administrative processes, effective intelligence and surveillance, competent law enforcement, robust laws and a court system that functions well. For terrorism is a moving threat, precisely because it is both ideological and criminal in its genesis and implementation. International experience would suggest that measures that support and enhance the basic principles on which democratic societies function – respect for the basic freedoms and the rule of law – are more likely to be effective in maintaining security and public safety than are measures that limit personal freedom in cases short of criminal guilt established by due process of law.

Some Concluding Observations

The political reality of the 41st Parliament is that a Bill along the lines of the draft currently before the Legal and Constitutional Committee will pass into law. What this submission advises the Committee to do is to mitigate as far as possible those provisions that have the greatest impact on the general application of *habeas corpus* and to build proper safeguards into the legislation to ensure that it is neither arbitrary nor unsafe in its application.

There are four matters that the Committee might wish to consider in particular.

- First, it would be important that the Bill under consideration not encourage "creep", whereby other classes of crimes attract similar provisions that might affect *habeas corpus* and trial by jury. Phrases like "terrorism **and other serious offences**" (my emphasis) should set the alarm bells ringing.
- Second, and this is in some senses related to the first point, the Committee should consider the shortest practicable sunset period for this legislation which should not, in any case, exceed five years. The Government may succeed in the argument that this legislation is necessary in current circumstances. But Churchill's warning should not be ignored: the community should not become habituated or inured to restrictive powers, and such powers should be under constant review with respect to both necessity and effectiveness.

- Third, the Committee should demand total transparency in the transition from interim to final control orders, if such a measure is proceeded with. In this regard:

  (a) It is critical that the Parliament understand in detail how evidence and other material will be handled in determining the status and freedom of people who might be "of interest" but who are not charged with an offence.

  (b) It is also essential that persons who might be subject to control orders or preventative detention have full legal representation, and that administrative decisions made by the proper intelligence and law enforcement authorities be subject to proper legal examination and contestability. The requirement for a police or intelligence official to give evidence to justify the application will promote both transparency and careful decision-making.

  (c) It is highly likely that the information supporting the application of such orders will be classified, and that its release could jeopardise both operational effectiveness and national security. Nonetheless, since the protection of individual liberty is at the heart of what Australia's democracy stands for, appropriate legal tests need to be in place.

  (d) Accordingly, at least for control orders,[3] there should be full merits review (not simply judicial review) before a judge (or, possibly, the Administrative Appeals Tribunal) with all relevant material disclosed to the judge or Tribunal, and to at least a representative of the subject of the control order. In this regard, the Committee ought give consideration to the creation of a panel of security-cleared Special Advocates, such as were used in similar situations in the United Kingdom, subject to the reforms to their role recommended by the UK Parliament's Select Committee on Constitutional Affairs in its April 2005 Report *The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates* (HC 323-1).

- And fourth, unnecessary secrecy should be avoided at all costs. The integrity and robustness of the Australian legal system depends on its transparency. It is important that, with few exceptions (such as minors) the identity of those who have been charged is known, that the nature of the charges are known, and that court processes are unimpeachable, even if some aspects need to be handled *in camera*. Judicial independence, the right to legal representation and the very fact that the law operates publicly are essential safeguards.

Allan Behm

11 November 2005

[3] It is acknowledged that a short period of possible preventative detention will preclude a full merits hearing taking place before the detention has ended.