Submission for Senate Legal and Constitutional Committee's Inquiry into the Provisions of the *Anti-Terrorism Bill (No 2) 2005*

Submission by Bret Walker SC

The following suggestions are made about some of the provisions relating to or affecting the possible judicial review of control orders and preventative detention orders. It is not intended to convey any view about the general policy apparent in the terms of the Bill, nor any opinion about the validity of any of the proposed provisions were the Bill enacted.

2 The initial phase in relation to an interim control order somewhat resemble, in broad terms, the way in which search warrants and telephone interception warrants are sought and granted. That is, information in relation to facts is provided to the issuing authority, without any need for the information or the facts to be presented by way of admissible evidence. After all, the process is not a judicial proceeding in a court acting judicially.

3 The text of the Bill proposes in subsec 104.2(2) of the *Criminal Code* that the initial request be made only if the senior AFP member considers the relevant things "on reasonable grounds". By the proposed subsec 104.2(3), the draft request must include "a statement of the facts" for or against an order being made. The Attorney-General can require changes to the draft request.

4 The actual request then goes to the issuing court, which by the proposed para 104.4(1)(b) can require "further information". The consideration by the issuing court is expressed so as to require satisfaction "on the balance of probabilities" of the relevant matters.

5 An interim control order must state that the issuing court is satisfied of those matters, in order to comply with the proposed para 104.5(1)(a) – but neither that requirement nor the other requirements for the form of the interim control order stipulated in the proposed subsec 104.5(1) contemplates let alone requires the issuing court to set out what may be called the grounds on which the order was made. It should be stressed that the reasonable grounds which motivated the original request are the grounds perceived by the requesting officer, which are quite distinct from the grounds on which the issuing court makes its decision – as can be seen from the need for independent consideration of the issuing court in light of information additional to and perhaps different from the information which the requesting officer had originally perceived as constituting reasonable grounds.

6 The obligation imposed on the authorities, to be discharged by an AFP member, in relation to service of an interim control order is specified in the proposed subsecs 104.12(1) and (2). There now appears, at this stage of the process which comes after the issuing court has carried out its consideration and settled the form of the order itself, that material described as "the grounds on which the order is made" are to be stated – or, rather, a "summary" of them: proposed subpara 104.12(1)(a)(ii).

7 Who states the grounds in the first place? Who summarizes them? From the provisions noted above, it does not appear that the proposed legislation requires the issuing court to state grounds let alone to prepare or authorize a summary of them. Nor could it be argued that the nature of the issuing process require grounds, without the need to say so, as an aspect of the usual judicial duty to give adequate reasons for a decision – because the process is not a judicial proceeding.

8 It would be most unfortunate if this very important record of very drastic executive action against personal liberty were not required to be authentic. The only authentic statement of the grounds for an issuing court to have acted are the grounds as stated by that court. They could not be imputed to the court by the requesting officer, because the issuing court is obviously required, by the express provisions noted above, to exercise an independent consideration, which will often involve differential approval or weight to the various pieces of information or facts proffered by the requesting officer.

9 The risk of an inauthentic summary of grounds is somewhat worse, for obvious reasons.

10 Although the drafting of proposed subsec 104.12(2) does not designate who it is that makes the assessment of likely prejudice to national security, the combination of provisions noted above certainly does not indicate that it is the issuing court. The best reading is that in effect the police authorities not only get to state the grounds presumably to themselves from which they then state a summary to be served, but they also get to decide whether that summary should have omitted from it sensitive information.

11 Without any need for alarmist or inappropriate slurs against members of the AFP or lawyers advising them, it is easy to see that in practice the contents of a critical document, viz the summary of the grounds to be served on the person against whom an order has been made, may well not accurately represent the real reason why the order was made.

12 All that a lawyer may obtain in order to assist a person affected is copies of the order and the summary of the grounds: proposed sec 104.13. The whole of the possible ensuing judicial process of supposed challenge or review could well be founded on a false (albeit in good faith) basis. This is no way to commence or provide a foundation for an essential safeguard to ensure observance of the principle of legality correctly now understood either to constitute or to permit the rule of law.

13 In that judicial proceeding, there is seen a textual shift in the language of proposed sec 104.14, away from the language of warrant-style "information". At this later stage, there may be the adducing of "evidence" including by calling witnesses and the making of "submissions" – the language of truly judicial process at work.

14 The importance of this court proceeding as a safeguard can scarcely be overstated. Although it is most unfortunately headed as relating to "Confirming an interim control order" in fact sec 104.14 not only envisages the confirmation of an order, but also its avoidance, revocation or variation. This is the point at which the individual may assert his or her liberty against the executive authority of the Commonwealth, with the assistance of an impartial judiciary. It goes without saying that the process must be as truth-based, to speak aspirationally, as any judicial process – and because it concerns personal liberty, there is all the more reason not to make laws calculated to permit discrepancies between what actually happened and how it is later presented in a court.

15 How can lawyers properly advise on, let alone present advocacy about, whether there were any grounds on which to make an order (see proposed subsec 104.14(6)) without being confident of what the grounds of the issuing court were?

Not by mere summary, and not according to the say-so of the AFP. On any view, in adversarial litigation of this kind, one party should not control essential evidence in this manner.

16 Without elaborating the theme, I therefore respectfully suggest that the Committee recommend amendments to the Senate, so as to require that the statement of grounds be a full statement, no mere summary, be produced by the issuing court itself, and that any redactions or omissions for national security reasons be the result of the independent and recorded decision of the issuing court.

17 This would not be too laborious for an issuing court – of course the requesting officer can proffer a draft form of grounds and ought in any event responsibly suggest national security redactions or omissions, for consideration and adoption in appropriate cases by the issuing court.

18 There are other provisions with similar defects, such as the proposed subpara 104.26(1)(a)(ii).

19 In relation to preventative detention orders, the same critical defect may be seen in the corresponding provisions, such as the proposed para 105.32(1)(b).

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