11 November 2005

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

Dear Senator Payne,

Senate Legal and Constitutional Committee (the Committee)
inquiry into the Anti-Terrorism Bill (No. 2) 2005

The current *Anti-Terrorism Bill (No. 2) 2005* bears a striking resemblance to recent anti-terrorism legislation in the United Kingdom (UK). However, unlike the UK, Australia has not suffered a terrorist act on her own soil, does not have a Human Rights Act and is not subject to the European Court of Human Rights. And perhaps just as disturbingly, Australia's Parliament has so far failed to engage in the type of debate seen in the UK.[1]

Without the checks and balances offered under the UK model, the current Bill is a disproportionate increase in government powers at the expense of personal liberties. As a western democracy, Australia and Australians believe in freedom of communication, association, conscience and belief. Only the first of these finds partial protection in our Constitution.[2] As a country with, by western democratic standards, weak constitutional protection of civil liberties, we must vigilantly observe the balance between security and liberty.

The current Bill raises significant concerns, most of which will be addressed in greater detail by other submissions to this inquiry. It is the goal of this submission to draw two issues to the Committee's attention:

1. Process
2. Accountability

Process

The Bill and its predecessors have sought to protect Australia's national security. The process created by the Bill is fundamentally incompatible with the rule of law and our precepts of justice. The punitive measures imposed by control orders and preventative detention are, by their very nature, exercised against those who are supposed to be presumed innocent until found guilty by their peers through due process. The measures and offences proposed by the Bill, including the overly broad definition of sedition, are a direct assault on any right[3] to freedom of association, communication, conscience or belief.

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1 Reference is made to recent debate in the House of Commons over the use of control orders and preventative detention under the *Terrorism Bill 2005 (UK)*.

2 An implied right to freedom of political communication as found by the High Court in *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520.

3 Whether recognised under law or only in Australia's social and cultural values.

Experience in other jurisdictions has demonstrated that terrorist acts can occur even in the face of the most draconian of measures.[4]

The use of the judiciary in their personal capacity[5] is disingenuous. Those ignorant of the law and arguably the most vulnerable in our society are unlikely to understand a judge acting persona designata or the doctrine of the separation of powers which the Bill is so careless of. The Committee and indeed, all Australians, should be suspicious of a Bill that deceptively uses the judiciary to legitimise the use of unprecedented and to some extent, unaccountable powers.

The granting of orders ex parte and the limited appeal rights[6] are other procedural failing of the Bill. The express recognition of the Queensland Public Interest Monitor (PIM) only highlights the disadvantages faced by residents of other States and Territories. Where ex parte hearings are required due to pressing and justified risks, the use of an independent PIM is an essential mechanism to protect both the defendant's interests and to ensure due process and the rule of law. The Bill fails to ensure that justice is seen to be done. Rather, 'justice' is conducted in secret, without representation and by judges acting in an administrative and not judicial capacity.

Flaws in administrative process must be remedied through greater accountability and transparency. Indeed, democratic government is reliant on accountable and transparent administration. Where accountability and transparency fail, so will democracy.

Accountability

In its present form, only control and preventative detention orders are due to sunset after ten years.[7] Other provisions of the Bill, including surveillance powers,[8] sedition offences and certain powers to obtain information have no sunset provisions. Moreover, section 4 only requires schedules 1, 3, 4 & 5 to be reviewed after 5 years. Given the powers granted under the Bill, the failure to provide for formal review or sun-setting raises serious concerns. Sun-setting and independent reviews are essential elements of scrutiny, accountability and transparency in government. The limited reporting requirements under the Bill fail to provide any measure of accountability or provide a basis for later analysis of the Bill's effectiveness.[9]

Government must be seen to be accountable. Bureaucrats are accountable to Parliament and Parliament is accountable to the electorate. The Bill fails to make those exercising powers under its provisions sufficiently accountable to the Parliament or the Judicature. This failing must be addressed if our democratic values are to be upheld.

The similarities between the Bill and existing and proposed UK legislation are evident. While Australia lacks many of the UK safeguards,[10] we may still benefit from current debate in the UK. The attention of the Committee is drawn to the reports of the Independent Reviewer, Lord Carlile, and the Newton Report. More recent debate in the

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4 Terrorist acts have occurred in the UK despite similar measures and terrorist acts are common in more repressive regimes – regimes which commonly provide for the preventative detention and incarceration of persons without charge or trial.

5 As provided for @105.18(2), 105.46(1) & 3ZQQ.

6 Preventative detention orders can only be appealed after they are no longer in force; @105.51. Control orders may only be appealed to the 'court' (judicial officer acting persona designata) that issued it; @104.18.

7 Control orders are sun-setted @104.32, preventative detention orders 105.53 and limited sun-setting of stop search and question powers @3UK.

8 Both optical surveillance under schedule 8 and surveillance of financial transactions under schedules 3 & 9.

9 Contrast this with the reporting provisions under UK anti-terrorism legislation.

10 Human Rights Act and the use of Independent Reviewers to name but two.

House of Commons is also instructive.[11] The Committee is urged to consider this Bill most carefully to ensure that its provisions are necessary, proportionate and effective and do not sacrifice personal liberties for the sake of seeming to improve security.[12]

Yours sincerely,

Georgia King-Siem
Solicitor

[11] See in particular debate on November 2, 3 and 9, 2005.

[12] Improvements in security will not prevent terrorist acts while the erosion of liberty will only further disenfranchise many within our community.