Submission on the Anti-Terrorism Bill (No. 2) 2005

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I would like to thank the Committee for the opportunity to make a submission to the inquiry. Given the shortness of time in which to make a submission, I will only be addressing the constitutionality and efficacy of control and preventative detention orders.

General comment: the nature of Australian law

It is almost trite to point out that Australia is the only common law jurisdiction without a bill of rights. Justice McHugh, in a decision handed down last year concerning mandatory detention, bemoaned the absence of such an instrument while upholding the constitutionality of legislation which his Honour nonetheless noted had 'tragic' ramifications for the individuals whom it affected.[1] The effect of legislation, for the most part, is not considered by Courts when considering constitutionality. The Australian Parliament can, and does on occasion, pass legislation that has such consequences, including breaching fundamental liberties that would be protected by the Courts in other democracies, including nowadays in the United Kingdom.

Two consequences arise out of this. Firstly, in our system of law the onus falls on Parliament to scrutinize legislation to ensure that it cannot and will not be abused. The first draft of the anti-terrorism legislation presented to the Parliament was more open to such abuse than the current version, although problems clearly still remain. We cannot rely upon the Courts to cure these deficits. And we cannot be confident that Parliament will get it right first time round. It is for this reason that there is an imperative to put into place a stronger review mechanism than currently exists, and to shorten the sunset clause beyond its currently meaningless length.

Secondly, we must be wary of borrowing legislation from the British in the expectation that it will operate in a similar manner given our common legal heritage. British law now operates within the context of the Human Rights Act 1999 (the HRA) which, while not entrenched (ie it can be amended or repealed by future Parliaments), has significant cultural and legal ramifications. Under the HRA, British judges are required to interpret legislation, as far as possible, compatibly with Convention rights. Our judges have no such duty other than a rather weak common law presumption against abrogation of certain common law and international law rights – a presumption our Judges have found it rather easy to rebut, as recent case law demonstrates. British judges can also make incompatibility statements where legislation is nonetheless found in breach, with widespread political consequences that the British executive and legislature are at pains to avoid. Again, no such provision exists here. British judges are also able to use the doctrines such as proportionality and the margin of appreciation when considering the impact of legislation on rights, thereby providing a judicial mechanism for giving due

[1] *Al-Kateb v Godwin* (2004) 208 ALR 124, 133 [31]; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 208 ALR 201, 203 [4].

deference to Parliament; our Judges have no such tools at their disposal. Finally, the British have introduced a protective mechanism (a Special Advocate) for the testing of sensitive evidence which our legislators to date have failed to emulate. To borrow legislation from a jurisdiction with such constitutional arrangements and protections that might cure or at least soften the unforeseen and potentially unjust impact of a law, without incorporating appropriate safeguards, is shortsighted and dangerous.

There is one area, however, where our Courts guard rights jealousy, albeit largely incidentally: when considering the constitutionality of legislation for breach of the separation of judicial power. Indeed, the Prime Minister has made it clear that his approach to the States to pass preventative detention laws was made in light of legal advice that federal legislation allowing for preventative detention for 14 days would fall foul of the doctrine. That the government is deliberately and expressly attempting to by-pass constitutional safeguards is worrying. It reflects an attitude towards the Constitution as an impediment to tackling terrorism that must be rejected. The doctrine of separation of powers has had some impractical consequences in the past (striking down cross vesting legislation, for instance, was widely unpopular). However, nothing is more fundamental to the system of government we enjoy than ensuring that the judicial branch of government is not co-opted as an arm of the executive, or implicated in such a way with government policy that it would lose the confidence of the people as an independent, impartial arbiter.

While considering whether the laws may fall foul of the separation of powers doctrine, the Committee should keep in mind the reason why these doctrines were incorporated into the Constitution, why judges guard them jealously, and why their protection is particularly imperative in Australia.

The framers of the Constitution modeled the separation of powers doctrine on the American Constitution, and were well aware of its rationale and importance. The State, under this theory, must be given a certain amount of public power, but cannot be allowed to abuse its power either with respect to other polities or its own subjects. And while the framers considered it unnecessary to entrench a bill of rights, they undoubtedly subscribed to the theory that the judicial branch of government had a central role in guarding against such abuses. This is achieved by separating the judicial branch and giving it exclusive powers that no other branch can either exercise or interfere with.

In this sense, when a Court protects the separation of powers, it does more than apply some sort of technical formula: it defends the structure of the society within which we must live.

These are not new ideas. Montesquieu and Locke had said as much centuries earlier. And our Judges have similarly explained the doctrine in this light, increasingly so in recent years. To put it simply, in our system nothing more fundamentally threatens the rule of law than an interference with the judicial branch of government.

Constitutionality

i) General Principles

The constitutionality of the mechanisms for issuing control orders (by Courts) and providing for preventative detention (on warrants issued by Judges acting in their personal capacity) depends upon how the Court interprets the operation of Chapter III of the Constitution. This is an area of considerable uncertainty. Not only is the nature of judicial power difficult to define with any accuracy, but the Court is currently split on questions of appropriate judicial role, whether there is a general constitutional immunity from detention without adjudication of criminal guilt, and the extent to which legislation that intrudes upon substantive or procedural aspects of the judicial role might be unconstitutional.

It is possible, however, to review the main principles which make up the doctrine of the separation of judicial powers.

The starting point is the fact that the Court has read the Constitution as providing for a strict separation of judicial power. As a result, only a Ch III court can exercise the judicial power of the Commonwealth, and a Ch III court cannot exercise non-judicial power unless it is incidental to their exercise of judicial power.

Furthermore, the separation of powers protects the way in which a Court exercises judicial power itself. As a result, Parliament cannot make 'a law which requires or authorises the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner that is *inconsistent with the essential character of a court or with the nature of judicial power*.'[2]

Judicial power itself is an elusive power, and no definition is at once exclusive and exhaustive.[3] It is usual to point to certain indicia, such as the ascertainment of existing rights, duties and liabilities in a controversy by reference to an objective legal standard and not subject to policy considerations.

Judicial process has also been identified by judges as central to the judicial power. As Justice Gaudron has pointed out, 'it is an essential feature of judicial power that it be exercised in accordance with the judicial process.'[4] Her Honour, whose opinions on Ch III have been highly influential in recent decisions of the current bench, noted:

> In my view, consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the

[2] *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).
[3] *Polyukhovich* (1991) 172 CLR 501, 532.
[4] *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496 (Gaudron J).

> appearance of impartiality, the right of a party to meet the case against him or her, the independent determination of the matter in controversy by application of the law to the facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of fair trial according to law. It means, moreover, that a court cannot be required or authorised to proceed in any manner which involves an abuse of process, which would render its proceedings inefficacious, or which tends to bring the administration of justice into disrepute.

A further element of judicial power is the need to act in accordance with the principles of natural justice or procedural fairness.[5]

The Court has also recognized exceptions to the strict separation doctrine. Relevantly, a non-judicial power can be conferred on a judge when it has been consented to in their personal capacity. However, this is subject to the caveat that 'no function can be conferred that is incompatible wither with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power'.[6]

The Court has recognised that 'incompatibility' may arise in a number of different ways.

> Incompatibility might consist in so permanent and complete a commitment to the performance of non-judicial functions by a judge that the further performance of substantial judicial functions by that judge is not practicable. It might consist in the performance of non-judicial functions of such a nature that the capacity of the judge to perform his or her judicial functions with integrity is compromised or impaired. Or it might consist in the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge to perform his or her judicial functions with integrity is diminished. Judges appointed to exercise the judicial power of the Commonwealth cannot be authorised to engage in the performance of non-judicial functions so as to prejudice the capacity either of the individual judge or of the judiciary as an institution to discharge effectively the responsibilities of exercising the judicial power of the Commonwealth.

The Court has primarily focused on this last type of incompatibility: *where public confidence in the integrity of the judiciary as an institution or in the capacity of an individual judge to perform their judicial function with integrity is diminished*. A majority of the High Court in *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* stated:[7]

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[5] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 101 [41] (Gaudron and Gummow JJ): 'procedural fairness is a concomitant of the vesting of the judicial power of the Commonwealth…'
[6] *Grollo v Palmer* (1995) 184 CLR 348.
[7] (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

> The statute or the measures taken pursuant to the statute must be examined in order to determine, first, whether the function is an integral part of, or is closely connected with, the functions of the Legislature or the Executive Government. … Next, an answer must be given to the question whether the function is required to be performed independently of any instruction, advice or wish of the Legislature or the Executive Government, other than a law or an instrument made under a law. ... [If not], it is clear that the separation has been breached. The breach is not capable of repair by the Ch III judge on whom the function is purportedly conferred, for the breach invalidates the conferral of the function. ... [If so], a further question arises: is any discretion purportedly possessed by the Ch III judge to be exercised on political grounds - that is, on grounds that are not confined by factors expressly or impliedly prescribed by law?

ii) Applying the Law to the Bill

Control orders

Division 104 of the Bill provides for control orders. A control order may, according to subsection 104.5(1)(f), impose restrictions on the individual concerned for a period of up to 12 months.

These restrictions may amount to significant restrictions on the person's freedom of movement and association, the right to liberty of person, right to privacy, and freedom of expression, amongst others.[8] As widely noted, a control order may result in the involuntary detention (through house arrest) of a citizen who has not committed a crime and against whom there is not enough evidence to charge with a criminal offence, including conspiracy.

Control orders are to be made by an 'issuing court' where the Court is satisfied 'on the balance of probabilities' that making the order would substantially assist in preventing a terrorist act; or that the person has provided training to, or received training from, a listed terrorist organization. The Court must also be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.

This balancing exercise is welcome, giving the Court an appropriate discretion as to whether to grant the order. It is not, however, equivalent to a provision that provides the Court with the explicit power to consider the proportionality of the order with respect to the liberties being abridged. The means for achieving the ends, in other words, are not to be considered against a benchmark such as certain fundamental liberties, although some Judges may take such a measurement into account.

[8] Whether the legislation might disproportionately burden the freedom of political communication will not be considered in this submission.

The first hurdle that the legislation must pass is the threshold question: can a Court order the involuntary detention of a citizen who has not been adjudged guilty of a criminal offence? The High Court is currently split on this issue (see *Fardon v Attorney-General for the State of Queensland*),[9] with Justices Gummow and Kirby holding that the outcome itself, regardless of the process by which it was obtained, is at odds with the proposition that there is a 'constitutional immunity' from such 'non-punitive' (a term also open to considerable uncertainty) detention. And while there are several exceptions to this immunity, no such category of exception has yet been established which fits the situation covered by control orders where *the federal judiciary itself grants such orders*. The only analogous preventative detention cases decided by the Court have concerned their implementation by State courts, not the federal judiciary, and thus are not directly on point (although lessons can be learned from these cases – see below). It is also worth noting that despite doubts being thrown on the constitutional immunity by some members of the Court, it is still good law.

To give a Court such powers as fall within the control orders thus creates inevitable uncertainty.

Should the Court follow Justice Hayne's approach and find that there is nothing inherently unconstitutional about a federal Court issuing orders that result in involuntary detention, the question moves to whether the Court is being required to exercise the judicial power 'in a manner that is *inconsistent with the essential character of a court or with the nature of judicial power*.'

The recent case of *Fardon* gives some indication of the criteria which the Court might consider to be consistent with judicial process when involved in a predictive process about the risk of a future crime and the power to impose restrictions on an individual's liberty as a result ie to impose non-punitive, preventative restrictions on liberty.

In *Fardon*, Callinan and Heydon JJ noted that the legislation required there to be 'reasonable grounds for believing the prisoner is a serious danger to the community', which their Honours describe as a 'formidable threshold'. This threshold parallels that set in the current legislation. However, their Honours also placed considerable weight on the fact that the legislation required that '***the prisoner will be provided with full disclosure and details of the allegations and all other relevant material filed by the Attorney-General against him and provides for the filing of material by him***… The prisoner has full rights to cross-examine and to adduce evidence.'[10] They noted that the issue will go to a final hearing at which a Court can only act on 'acceptable, cogent evidence' and that the degree of satisfaction required is one of "a high degree of probability."

Interestingly, their Honours also took notice of the 'safeguard' of requiring the Court to have regard to certain 'relevant and important matters', including 'psychiatrists' reports; the co-operation or otherwise of the prisoner with the psychiatrists; other relevant reports; the prisoner's propensities; any pattern of offending by the prisoner; the prisoner's

[9] (2004) 210 ALR 50 ('*Fardon*').
[10] Ibid [221].

participation in rehabilitative programmes and the results of them; the prisoner's efforts to address the cause of his behaviour; the prisoner's antecedents and criminal history….'[11]

These factors considered in *Fardon* are relevant because the Court under the current legislation will be similarly being asked to carry out a predictive exercise, unlike that normally considered by the Court in a criminal process.

The factors considered by Callinan and Heydon JJ probably amount to the absolute minimum standard that would be applied to a federal Court exercising federal judicial power in similar circumstances. I say this in light of the fact that these are Judges who do not subscribe to the 'constitutional immunity' that Gummow and Kirby JJ still adhere to (and therefore do not find preventative detention problematic per se), they were considering State judicial power (which they recognize as being different from federal power), they were applying the 'incompatibility' test which is not identical to, and probably sets a lower threshold than, the 'consistent with judicial process' test which would apply to a federal Court, and they were dealing with legislation which would provide for the detention of someone who had already been determined to be criminally liable for an offence in the past.

By contrast, the current draft legislation will apply to someone who has not been adjudged guilty of any criminal offence or indeed even charged with such an offence (otherwise they would have been arrested under conventional criminal law; it can be assumed that the evidence is lacking on this front). Crucially, the legislation implicates directly in this procedure the federal judiciary itself, not the State judiciary who operate within State constitutional systems which lack a separation of powers doctrine and are therefore only assessed against a weaker incompatibility doctrine. It can therefore be expected that the High Court would consider carefully the provisions that ensure that the judicial process is not interfered with in the grant of orders. The emphasis of the Court on the fact that the protective purpose of the *Dangerous Prisoners (Sexual Offenders) Act* in *Fardon* was considered to have been achieved with due regard to a full and conventional judicial process, including unfettered appellate review, is therefore significant.

In my opinion, control orders in the draft Bill have the potential to fail this minimal test, even if it survives the more general challenge (ie that such orders simply cannot be made by a federal judicial body). This is because it lacks a 'genuine adjudicative process'[12] which would allow a party to meet the case against him.

In reaching this conclusion, I note that the degree of satisfaction required of the Court is lower than that approved in *Fardon*. However, I do not consider this of itself to be fatal. More problematic, either cumulatively or independently, are the ***impediments*** to the person who is the subject of a control order testing their detention through a proper judicial process. This arises primarily as a result of the evidentiary restrictions under

[11] Ibid [224]. At present, the draft legislation merely allows for a control order to include a provision that a person to participate in specified counselling or education, although they cannot be required to participate (104.5(3)(l) and (6)).
[12] See *Fardon* [211] and [219].

which they will labour. Thus section 104.12 merely requires that they be given 'a summary of the grounds on which the order is made' and subsection (2) provides expressly that disclosure of evidence 'likely to prejudice national security' need not be provided in this summary (similarly see 104.26(2)). National security, it should be noted, is very broadly defined in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)[13]. In light of its definition, concerns about the protection of national security will invariably coincide with the criteria for the grant of a control order and, as a result, those issued with a control order and their lawyers will be given only minimal information, thereby significantly impeding their capacity to challenge the order. This does not appear to be cured by the ability of the person in relation to whom a control order is made to 'adduce evidence' at a hearing in relation to the confirmation of a control order (s 104.14; or a revocation: s 104.18). The rules of evidence that would normally apply in a prosecutorial context concerning disclosure of evidence would not seem to apply here.

It is fundamental to our judicial system that a person be entitled to answer the case against them; the rules of evidence thus provide that those charged with an offence be provided with all the evidence the prosecution possess. And while there are precedents for sensitive evidence to be kept from an accused, there are mechanisms for ensuring that this does not interfere unduly with the judicial process (see below with regard to Special Advocates in the UK). No such mechanisms have been adopted in this draft legislation. As a result, the provisions might result in a court proceeding in a manner that does not ensure impartiality, that fails to provide an opportunity of the party subject to an order to meet the case against him or her, that denies them natural justice and impedes the capacity of the court to ascertain the facts in accordance with standards judicial rules and procedures. The provisions thereby remove the 'essential protection of the citizen inherent in the judicial process.'[14]

In other words, the legislation allows for a situation in which an individual may be subject to a control order that subjects them to house arrest, denies them the capacity to communicate with others, subjects them to 24 hour surveillance and tracking, on the basis of evidence that they are ultimately unable to challenge in Court. In my opinion, the effective inability to challenge a judicial order which removes basic rights recognized in our legal system since the 13th century as fundamental to our constitutional system, potentially including a deprivation of liberty otherwise than on adjudication of criminal guilt, is inconsistent with the nature of judicial power. Without more, this will undermine the judicial process and is likely to be considered unconstitutional.

Preventative Detention

Preventative detention orders take a different format from control orders in that they are issued by judges acting in a personal capacity. The question of constitutionality thus becomes one of incompatibility: is the judge's exercise of this non-judicial function

[13] Sections 8 and 9, which refer in turn to the ASIO Act 1979 s 4
[14] *Re Criminal Proceeds Act 2002 (Qld)* [2003] QCA 249 [11] (Williams J)

compatible with their performance of judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power.

It is notable that there have been strong dissents in incompatibility decisions before the Court. Thus Justice McHugh found telecommunications interception warrants granted *ex parte* by those holding federal judicial office 'contravenes the spirit of the requirement that justice in the Federal Court should be open; it weakens the prescription that the federal courts are independent of the federal government and its agencies… That public perception must be diminished when judges of the Federal Court are involved in secret, ex parte administrative procedures, forming part of the criminal investigative process, that are carried out as a routine part of their daily work… This close association of judicial and non-judicial functions makes it likely that the general public will conclude that the federal judiciary is involved in secretly approving police investigative and invasive procedures…'[15] Similarly strong concerns about the 'elaborate charade' that the grant of warrants involves was expressed by Justices Mason and Deane in *Hilton v Wells*.[16] The concern about a 'close association' of functions was built upon by the Court in *Wilson*.

While the granting of a preventative detention warrant is to be done independently of the advice or instruction of the executive and is not carried out on 'political grounds', there are aspects that might raise the concern of a Court. Firstly, by contrast to telecommunication warrants, preventative detention warrants result in effective incommunicado detention,[17] with the likelihood of the administrative detention ultimately resulting in (State sanctioned) detention for 14 days. This is a much more draconian consequence than the orders considered by the Court in *Grollo* and *Hilton*, where property and privacy concerns were paramount. Here, the Court is likely to be seen by the reasonable observer as being intimately linked to the 'fight against terror' which is being carried out by the other branches of government. That a detainee might ultimately appear before the same federal Court in which the judge who initiated their lengthy incommunicado detention sits only heightens a concern that there is a direct conflict with the judicial function. Furthermore, incompatibility may arise as a result of similar factors which were considered under the above discussion of control orders, ie the interference with judicial process.

The Committee, it is urged, should recommend that this function not be given to acting judges. As noted above, the Parliament has an obligation to protect the judicial branch from any appearance of being implicated in executive processes. At no time is this imperative more crucial than the present. Judges should, instead, be enabled to exercise their full powers under the *Administrative Decisions (Judicial Review) Act 1977* to

[15] *Grollo v Palmer* (1995) 184 CLR 348, 379, 383.
[16] (1985) 157 CLR 57, 84.
[17] Those subject to preventative detention orders are prohibited from contacting other people subject to very limited exceptions which can be further restricted by **prohibited contact orders (s 105.15) and restricted legal representation**.

review decisions made under the legislation. Such judicial review was agreed upon at the COAG meeting, but excluded from the current draft legislation.[18]

Can the legislation be salvaged? Appointment of Special Advocates

Is it possible to introduce measures that would not amount to an unlawful interference in the judicial process or incompatibility?

Other submissions will undoubtedly focus on various mechanisms for improving the current draft legislation so as to better achieve a fairer balance between competing priorities. Some of these will also affect the constitutionality of the provisions. Clearly, with respect to preventative detention there are good policy as well as legal reasons for taking the power to issue such orders out of the hands of current judges. There are similarly strong reasons to allow for greater judicial scrutiny of both types of orders through a more thorough process of judicial review. Ensuring that preventative detention is not effectively incommunicado might also alleviate the concerns of a Court that they not be involved in conduct that removes fundamental rights and potentially facilitates abuse in detention (that incommunicado detention often leads to abuse is well-documented by human rights monitors worldwide; it is for this reason that human rights law finds it anathema). However, for the purposes of this submission I will focus solely on one mechanism which could be introduced that would allow for greater balance between the need to protect evidence going to the heart of national security concerns and the individual's right to challenge the case against them in a Court of law. As noted above, I consider that this issue has the potential to affect the constitutionality of the control order provisions.

In my opinion, provisions which allowed for someone who is subject to a control order to better challenge the orders before the issuing court might protect the provisions from a constitutional challenge. There are real concerns that the current mechanism will result in the use of unreliable evidence, including hearsay and false accusations, which will result in severe restrictions on civil liberties which cannot be effectively tested or challenged in a Court, thereby undermine the capacity of the court to act impartially.

It is recognized, however, that there may be a need in some situations for 'secret evidence' to be protected from disclosure. This is an area that was given exhaustive treatment in a recent Australian Law Reform Commission Report, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (ALRC 98, 2004). The Commission's analysis of schemes operating in other jurisdictions is particularly valuable, and should be considered by the Committee.[19] Of particular relevance are the mechanisms established under UK anti-terrorism law for appointing **Special Advocates**. The Commission's analysis is worth citing (references omitted):

[18] As with the control orders, review by the State and Territory Courts (s 105.52) is similarly limited by the non-disclosure provisions.

[19] The report is available online at http://www.austlii.edu.au/au/other/alrc/publications/reports/98

> 10.84 The Special Immigration Appeals Commission Act 1997 (UK) allows rules to be made enabling the Special Immigration Appeals Commission (SIAC) to hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him or her, having regard in particular to the 'need to secure that information is not disclosed contrary to the public interest.' The Act also allows rules to be made enabling the SIAC to give the appellant a summary of any evidence taken in his or her absence. The relevant law officer may appoint a person to represent the interests of an appellant in any proceedings from which the appellant and his or her lawyer are excluded. Appointed lawyers are not responsible to the person whose interests they are appointed to represent.
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> > The Special Advocate is appointed from a list of ... cleared counsel by the Attorney General's office. He is permitted to see all the closed evidence, but once he has seen this material he is not allowed to have any contact with the appellant.
>
> 10.85 Part 7 of the Special Immigration Appeals Commission (Procedure) Rules 2003 includes provisions prescribing procedures to be followed where the Secretary of State wishes to rely on any material in proceedings before the SIAC but objects to it being disclosed to the appellant or his or her representative. Amnesty International has expressed particular concern about the SIAC's procedures in relation to its reviews of whether people are 'suspected international terrorists'—and as a consequence subject to detention, deportation or exclusion from refugee status:
>
> > the person concerned should be entitled to see and challenge all the evidence used to determine whether they are a 'national security risk' or a 'suspected international terrorist'.[185]
>
> 10.86 Importantly, persons detained under Part 4 of the *Anti-Terrorism Crime and Security Act 2001* (UK) can appeal a decision of SIAC to the Court of Appeal and the House of Lords and ultimately to the European Court of Human Rights where there are valid grounds for doing so.

The Commission cites the case of *The Secretary of State for the Home Department and M*, in which the Court of Appeal upheld a judgment of SIAC that a man, known as 'M', had been detained under the *Anti-Terrorism, Crime and Security Act 2001* 'on evidence that was wholly unreliable and should not have been used to justify detention'. The case is relevant for demonstrating not just the dangers which the use of such blanket non-disclosure provisions present for abuse, but how review mechanisms and the use of special advocates can remedy such abuses. In upholding the judgment, the Court of Appeal outlined the benefits of having a special advocate where secret evidence is led:[20]

[20] See ALRC 98, 10.87, citing *The Secretary of State for the Home Department and 'M'* [2004] Civ 324 [13].

> The involvement of a special advocate is intended to reduce (it cannot wholly eliminate) the unfairness which follows from the fact that an appellant will be unaware at least as to part of the case against him. ... As this appeal illustrates, a special advocate can play an important role in protecting an appellant's interests before SIAC. He can seek further information. He can ensure that evidence before SIAC is tested on behalf of the appellant. He can object to evidence and other information being unnecessarily kept from the appellant. He can make submissions to SIAC as to why the statutory requirements have not been complied with. In other words, he can look after the interests of the appellant, insofar as it is possible for this to be done without informing the appellant of the case against him and without taking direct instructions from the appellant.

Conclusion

Under international human rights law, certain rights can be derogated from where there is an exceptional and actual or imminent danger which threatens the life of the nation. A range of tests for establishing whether such a situation exists have been developed.[21] It is unclear that such circumstances currently exist in Australia. Furthermore, it is unlikely that this legislation will ever be tested against such principles. All we have is our Constitution, and the protections which it stipulates are relatively weak, allowing for tragic consequences to result of valid legislation. The system of responsible government may act as an indirect protector of rights in some circumstances, but given the likelihood that any abuses of this legislation will affect a small minority of Australians, it is unlikely that the majority will be so concerned as to pressure their representatives for amendments once it is in place, or vote according to a knowledge of its operation which will largely be in secret.

Much is made of the need to 'balance' human rights obligations against national security. It is not clear, however, that it is appropriate or effective to talk in terms of a trade off. As Ronald Dworkin has pointed out, the metaphors of 'trade-off' and 'balance' are 'deeply misleading'.[22] Instead, we should be considering what justice requires, what fairness demands, and what is involved in treating everyone with equal concern and respect. If what the Committee is doing is 'balancing interests', then it must ensure that the provisions are indeed temporary. Too often such legislation becomes part of ordinary law over time, escaping the context in which they were created and becoming 'engines of a general leveling down in the protection of human rights'.[23]

One of the few mechanisms which Australia has at its disposal to protect citizens from the abuse of power by other branches of government is the exclusive vesting of judicial

[21] See notably the "Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights" (1985) 7 HRQ 3 which says that the threat to the life of the nation is one that: (a) affects the whole of the population and either the whole or part of the territory of the State, and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant.
[22] Dworkin, 'The Threat to Patriotism', NY Review of Books, 28 Feb 2002, 44.
[23] Marx and Clapham, *International Human Rights Lexicon*, 357

power in the federal judicial branch. Jacobs J in *R v Quinn; ex parte Consolidated Foods Corporation* noted that the separation of judicial power ensures that the rights of citizens are protected

> by ensuring that those rights are determined by a judiciary independent of the parliament and the executive. But the rights referred to in such an enunciation are the basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom.[24]

The legislature has a responsibility to respect this mechanism. It should not treat its current role as a balancing exercise, nor should it treat the Constitution as an impediment to be sidestepped or the judiciary as a body to be co-opted into an executive enterprise.

[24] [1977] 138 CLR 1, 11.