ADMINISTRATIVE REVIEW COUNCIL

14 November 2005

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

Dear Sir/Madam

Anti-Terrorism (No 2) Bill 2005

The Administrative Review Council welcomes the opportunity provided by the Senate Legal and Constitutional Legislation Committee to comment on the Anti-Terrorism (No 2) Bill 2005.

The Council's submission to the Committee is attached. I trust that it will be of assistance.

Should you wish to contact the Council further in relation to the submission, please contact the Council's Executive Director, Margaret Harrison-Smith, on telephone (02) 6250 5801 or by email at <margaret.harrison-smith@ag.gov.au>.

Yours sincerely

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Administrative Review Council Submission to Senate Legal and Constitutional Legislation Committee Inquiry into the *Anti-Terrorism (No 2) Bill 2005*

In accordance with its functions under the *Administrative Appeals Tribunal Act 1975* (Cth), the Council directs its comments at the administrative review and accountability mechanisms contained in the Anti-Terrorism (No 2) Bill 2005.

The comments relate principally to aspects of the administrative decision-making processes relating to the preventative detention order regime proposed for inclusion in new Division 105 of the *Criminal Code Act 1995* (Cth). The comments also address several aspects of the control order regime proposed for inclusion in new Division 104 of that Act.

The Council appreciates that the Bill has been the subject of careful consideration by Government and negotiations with the States and Territories. The Council recognises also that the Bill represents an informed response to the realities of the current national security environment. The Council's comments on the Bill derive from considerations of administrative best practice and do not purport to reflect knowledge of that environment.

The Council notes that, in the time available, it has not been possible for it to undertake an extensive examination of the Bill or to assess it fully in the context of related Commonwealth legislation or similar overseas legislation. For this reason also, not all Council members have been able to consider or to contribute to the Council's submission. Additionally, not all Council members are in agreement with views expressed in the submission.

Overview of comments

The Council's main comments on the Bill are as follows:

- the Bill should require people taken into custody under a preventative detention order to be provided with a copy of the order and the summary of grounds at the time they are taken into custody or, if that is not possible, as soon as practicable thereafter

- to the extent possible, the Bill should require a full statement of reasons to be provided for a decision in relation to the issue of an order in the same way as is required for other administrative decisions under the *Administrative Appeals Tribunal Act 1975*. The effect of curtailing reasons is to limit

subsequent review at all levels and to detract from a person's ability to understand and as necessary, to exercise review or appeal rights

- in the event that the current provision for summaries of reasons for decisions is retained, consideration should be given to providing clarification in the proposed legislation in relation to their required content and who is to draft them

- although it may be difficult to specify in advance who will make a decision about information prejudicing national security, consideration should be given to making provision in the legislation for who is to determine when to exclude material from a summary of reasons on the basis that its disclosure would be likely to prejudice national security within the meaning of the *National Security Information (Civil and Criminal Proceedings) Act 2004*; and

- consideration should be given to linking the consent of the Attorney-General to a request for an interim control order to the same or a similar level of satisfaction as that provided in s 104.2 of the Bill for senior AFP members applying for the order.

Background to consideration

The following is an overview of the main elements of the Bill in so far as they are relevant to the Council's consideration.

A. Preventative Detention Orders – an overview

The Bill provides for three sorts of preventative detention orders - initial orders, continued and extended orders. The object of the orders is to allow a person to be taken into custody and detained for a short period of time, initially 24 hours, to prevent an imminent terrorist act occurring or to preserve evidence of or relating to a terrorist act (s 105.1).

Who may issue and on what basis

Orders may be sought by a member of the AFP (s 105.7) from the following issuing authorities:

- in the case of initial orders and extensions of such orders, from a senior AFP member (a Commissioner or Deputy Commissioner of the AFP or a member of or above the rank of Superintendent (s 100.1(1)); and

- in the case of continued orders or extensions of such orders, from persons who are judges, Federal Magistrates, Administrative Appeal Tribunal members[1] or retired judges (s 105(12)).[2]

Orders can only be applied for by an AFP member and issued by an issuing authority:

- where a threat is pending, if they are 'satisfied that…there are reasonable grounds to suspect' that the person will engage in a terrorist act…, that making the order 'would substantially assist' in preventing a terrorist act occurring and that the detention is 'reasonably necessary' for that purpose (s 105.4(4));

- where a terrorist act has occurred - if they are 'satisfied' that the act has occurred, that it is 'necessary' to detain the subject to preserve evidence and that the detention is 'reasonably necessary' for that purpose (s 105.4(6));

- in the case of extended orders – if they are 'satisfied that detaining the person…is reasonably necessary for the purpose for which the order was made' (ss 105.10, 14)

Applications and order

The Bill requires applications for orders to be in writing and for initial orders to set out the facts and other grounds on which the AFP member considers that the order should be made and details relating to all previous orders (s 105.7). Further information may be sought by the issuing authority in relation to both initial and continuing order applications. All orders must also be in writing (s 105.8).

Information requirements

The Bill provides that 'as soon as practicable after a person is first taken into custody' they are to be provided with a copy of the order and a summary of the grounds on which the order is made (105.32)[3]

A range of information must be included in the order including the fact that the order has been made, the period during which the person may be detained under the order, any right to complain to the Commonwealth Ombudsman, the

[1] These appointees must also be legal practitioners of at least five years' standing.

[2] All these appointments must be with the written consent of the appointee.

[3] Failure to comply with this requirement will not affect the lawfulness of the person's detention. The requirements do not apply if the actions of the person being detained 'make it impracticable for the police officer to comply…' (105.31).

fact that they may seek from a federal court a remedy relating to the order or treatment while detained; their entitlement under s 105.37 to contact a lawyer (s105.28(1), s105.29(1)).

Review of decisions

The Bill provides that proceedings may be brought in a court for a remedy in relation to a preventative detention order or the treatment of a person in connection with the person's detention under an order (105.51(1)).

Judicial review under the *Administrative Decisions (Judicial Review) Act 1977* is excluded for decisions made under Division 105 (s 105.51(4)) although there is no attempt to exclude review on the basis of s 75(v) of the Constitution or under s 39B of the *Judiciary Act 1903.*

However, when the order has ceased to be in force, application can be made to the Security Appeals Division of the AAT in relation to decisions to make initial or continued orders or to extend or further extend an order (s 105.51). The Tribunal will have the power to declare the decision void and, in that event, to determine that the Commonwealth should compensate the person in relation to the person's detention under the order (105.51(7)).

The right to complain to the Commonwealth Ombudsman and to contact a lawyer is also provided for in the Bill.

B. Control orders

The object of these orders is stated in the Bill to be to 'allow obligations, prohibitions and restrictions to be imposed on a person…for the purpose of protecting the public from a terrorist act' (s 104.1)). There are two sorts of orders, interim and confirming orders. The orders may be imposed for a period not exceeding 12 months.

Who may issue and on what basis

Interim control orders may be sought by a senior AFP member (see above) from an issuing court (the Federal Court, the Family Court or the Federal Magistrates Court) where the member:

- 'considers on reasonable grounds' that the order would 'substantially assist in preventing a terrorist act' or

- 'suspects on reasonable grounds that the person has provided training to or received training from a terrorist organisation (s 104.2(2)).

Subsequently, the Bill provides for proceedings before the court which the person may attend, where the court confirms the interim order with or without variation, declares it void or revokes it (s 104.5(e)).

The court may make an order in circumstances where it 'is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed…is reasonably necessary…and reasonably appropriate and adapted, for the purposes of protecting the public from a terrorist act' (s 104.4)). In considering a request, the court may seek additional information (s 104.4(1)(b)).

Prior consent of Attorney-General

Prior to approaching the court for an interim order, the senior AFP member must obtain the consent of the Attorney-General to the order. The Attorney-General must be provided with a draft of the proposed application and may amend the draft prior to its submission to the court (s 104.2).

The Attorney-General's consent may be dispensed with in urgent circumstances on reasonable grounds (s 104.6). Consent must however be sought within four hours of the making of the request and if that is not done or consent refused, the order ceases to have effect (s 104.10).

Court processes/review

The Bill contemplates that the consent decision by the Attorney-General and the subsequent interim control order proceedings will conducted as *ex parte* proceedings.

Persons subject to confirmed orders may also apply to have the order revoked or varied (s 104.18).

In so far as the Bill explicitly proposes exclusion of 'decisions of the Attorney-General under s 104.2 of the *Criminal Code*' from the application of the ADJR Act (Division 4, Part 2, Item 25), it clearly contemplates that in giving or refusing his consent, the Attorney-General is exercising an administrative discretion. As with orders under proposed Division 105, there is no attempt to exclude review under s 75(v) of the Constitution or s 39 B of the Judiciary Act.

Detailed comments

There are very real impediments to the review of administrative decisions in the area of national security arising from their frequently urgent nature, the high degree of secrecy that is likely to surround such decisions and the often broad decision-making discretions that apply. The orders under consideration in this submission, exhibit all these characteristics.

Nevertheless, the proposed orders will undoubtedly have a significant impact on individual rights and for this reason, the Council considers that the practical difficulties associated with their review should be counter-balanced to the extent possible by protections for the rights of those exposed to the exercise of such decision-making powers.

Pre-preventative detention order procedures

The Council accepts that in view of the short time frame and the likely exigencies of the situation, it is appropriate for preventative detention orders to be made on an *ex parte* basis.

The Council notes that a copy of the order and of the summary of the grounds on which the order is made to be provided to the person 'as soon as practicable'. Rather, the Council considers that the requirement should be to provide the officer with a copy of the order and the summary at the time they are taken into custody and if that is not possible, as soon as practicable thereafter. This seems particularly important in view of the short duration of the period of detention.

In contrast, the Council notes that while an interim control order and a summary of the grounds on which it is made must be served on the person 'as soon as practicable after' the order is made, the order does not begin to be in force until it is personally served on the person (s104.5(1)(d)).

The Council also draws attention to the requirement in s 105.2(1)(e) of the Bill that continued preventative detention orders may be issued by a person who holds office as President or Deputy President of the AAT and who is 'enrolled as a legal practitioner of a federal court…' and 'has been enrolled for at least 5 years'.

Argument could arise as to whether the President of the AAT, required under s 7(1) of the *Administrative Appeals Tribunal Act 1975* to be a Federal Court judge, could properly be said to fall within this description. Additionally, the Council notes that all Deputy Presidents of the AAT are required under s 7(1AA) of the AAT Act to be legal practitioners of at least five year's standing.

Summary of grounds

Although there is a requirement to provide a person taken into custody with a

copy of the order made against them and a summary of the grounds (s105.32), the Council notes that a full statement of reasons does not have to be provided.

The opportunity for someone to seek administrative review of a decision is contingent to a large degree on the extent to which information about the reasons for the decision is available to that person. In the introduction to the 2002 *Commentary* on its guideline booklet *Preparing Statements of Reasons*, the Council notes that 'the requirement that decision makers give reasons for their decisions may be the single most important reform in the Commonwealth administrative review package of the 1970s'.

Nonetheless, the Council notes that the issues underlying a decision not to include information in a background statement are likely to be very similar to the sorts of considerations relevant to the security assessment process under the ASIO Act. The Council appreciates that it may well often be necessary to make deletions from what the applicant can see to protect collection methodologies including sources, and perhaps to safeguard a current operation. In the case of the review of security assessments, the Security Appeals Division of the AAT has access to the whole assessment when making its determination and so, there is some visibility for what ASIO has removed.

The Council assumes that it is proposed that the AAT would have a similar access to materials relevant to reviewing a proposed order under the Bill. The Council notes also that as a result of the inquisitorial nature of AAT proceedings, there is an obligation incumbent on the Tribunal itself to establish the facts of the matter before it that is not the case in adversarial proceedings before a court.

That said, the Council nevertheless considers that to the extent reasonably possible, those subject to an order under the Bill should be provided with a full statement of reasons for the decision, not just a summary. The effect of curtailing reasons is to detract from a person's ability to understand and as necessary, to exercise review or appeal rights.[4]

The Council also notes that information does not have to be included in a background statement if its disclosure would be likely to prejudice national security within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004.* The Bill does not indicate however, who is to make this determination or who is to prepare the summary of grounds. Although it may be difficult to specify in advance who will make a decision about

[4] The Council notes without considering in detail the Special Advocate system operating in the UK under the *Special Immigration Appeals Commission Act 1997* as amended by the *Anti-Terrorism, Crime and Security Act 2001.* Special Advocates are security cleared lawyers appointed to represent those appearing before the Special Immigration Appeals Tribunal in cases where closed material is involved.

information prejudicing national security, the Council believes this matter may warrant further consideration in the context of the Bill.

The Council considers that the requirement to provide the person with a copy of the order made against them and the reasons for that decision is a critical one and one that should not be waived unless all reasonable efforts have been made to do so.

AAT review

The Council notes the inclusion in the Bill of provision for review, after the event, of decisions in relation to preventative detention orders under the AAT Act by the Tribunal's Security Appeals Division.

This is a new jurisdiction for the AAT although the Tribunal does presently have jurisdiction in its Security Appeals Division in relation to adverse and qualified security assessments under the ASIO Act and procedures have been developed specifically in relation to the execution of that particular jurisdiction.

Rather than giving the Tribunal the power to declare a decision in relation to the issue of an order 'void' (s 105.51(7)(a)), the Council considers that it would be preferable simply to provide for the Tribunal to 'set aside' the decision if it would have taken that course when the order was in force.[5]

The Council notes that the Bill proposes that the procedures of the Tribunal will be modified as necessary by way of regulation to accommodate the new jurisdiction (s 105.51(7)).

The Council assumes that decisions of the Tribunal are excluded like all other decisions under Division 105, from judicial review under the ADJR Act but notes the provision for review under the AAT Act as a means of affording protection to individual rights.

Judicial review

As noted above, review under the ADJR Act would not be available for decisions in relation to the issue of preventive detention orders or consent orders by the Attorney-General although it would be possible to seek review on the basis of s 75(v) of the Constitution and s 39B of the *Judiciary Act 1903*.

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[5] This would seem more in keeping with the Tribunal's administrative rather than judicial function: *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

The explanatory memorandum to the Bill suggests this is appropriate as there are requirements in that legislation that are not suitable in the context of the security environment, and that the exemption is also 'consistent with existing exemptions for decisions that relate to criminal proceedings and with specific exemptions made in relation to ASIO questioning and detention warrants'.

The Council notes that the proceedings excluded from review are administrative not criminal proceedings and that ASIO questioning and detention warrants seem more in keeping with continuing preventive detention orders, as they are issuable by judges and retired judges rather than by AFP officers.

Nonetheless, on the question whether or not review should be available under the ADJR Act, in its 32nd report, *Review of the Administrative Decisions (Judicial Review) Act: the Ambit of the* Act, the Council accepted argument that 'the further facilitation of review under the ADJR Act could make the work of the agencies significantly more difficult'. [6]

One of the factors persuading the Council to take the position it took in its 32nd report was that 'what would be involved in many cases would be review of a decision of a Federal Court judge to grant a warrant to intercept…'[7] Under the Bill however, an initial detention order can be issued by a senior AFP member. The Council notes that under the *Australian Security and Intelligence Act 1979*, a warrant for the detention of someone is issuable by a person of judicial status and that a prescribed authority for the purposes of s 34Fof that Act relating to the detention or further detention of a person must, by virtue of s 34B of the Act be a retired judge of a superior court, a current State or Territory Supreme Court judge or a senior AAT member.[8]

The Council raises this for consideration.

Other

The Council notes that there is no direct link in s 104.2 of the Bill between Attorney-General's consent and the triggers for AFP members to apply for preventative detention orders. The effect of this is to afford the decision a very high level of protection from any subsequent review. The approach adopted in the Bill differs for instance from that provided for in s 34C of the *Australian Security Intelligence Organisation Act 1979* in relation to requesting warrants. Under that provision, the express requirement is that 'the Minister…is satisfied…' that the necessary grounds exist.

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[6] See page 74 of the report.

[7] Page 74 of the report.

[8] The member must be a legal practitioner of at least 5 year's standing.

The Council is uncertain why an interim control order of the court can be overruled in the case of urgent decisions by the subsequent refusal of consent by the Attorney-General (s 104.10(3)). The Council suggests that further consideration should be given to the relationship between these two provisions.