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Dear Secretary,

Inquiry into the provisions of the Anti-Terrorism Bill (No. 2) 2005

I would like to thank the Senate Legal and Constitutional Committee for the opportunity to make a submission to the Committee's Inquiry into the provisions of the Anti-Terrorism Bill (No. 2) 2005. If it assists the Committee, I would be prepared to appear before the Committee between 17-28 November 2005 to elaborate upon my submission. Should you have any queries, please do not hesitate to contact me.

My submission is divided into two parts. In *Part I*, I would like to bring to your attention 7 questions of fundamental importance which, in my view, have not been addressed adequately in the debate about the Anti-Terrorism Bill (No. 2) 2005.

In *Part II*, I would like to limit my submission to the question of parliamentary review of the operation of the Anti-Terrorism Bill (No. 2) 2005. Drawing on my international background, I would like to elaborate briefly on the review framework in place in other major US-allies in the so-called "War on Terror". I will particularly summarise the review mechanisms enshrined in the antiterrorism legislation of the United Kingdom and Germany.

Part I – 7 Questions

- 1) Are the measures proposed by the Anti-Terrorism Bill (No. 2) 2005 proportionate to *domestic* terrorism threat Australia is currently facing?
- 2) Are the new legislative measures as proposed by the Anti-Terrorism Bill (No. 2) 2005 likely to be effective?

- 3) What difference will the Anti-Terrorism Bill (No. 2) 2005 actually make to the terrorist threat?
- 4) How far is the Anti-Terrorism Bill (No. 2) 2005 based on fair estimates of actual consequences rather than on the comforts of purely symbolic action?
- 5) Would the provisions proposed to be enacted by the Anti-Terrorism Bill (No. 2) 2005 enable the security agencies to detect so-called “clean skins”?
- 6) Does the Anti-Terrorism Bill (No. 2) 2005 contain adequate and meaningful checks and balances and oversight mechanisms?
- 7) Is the Anti-Terrorism Bill (No. 2) 2005 compatible with Australia’s legally binding obligations under international law, specifically with Australia’s legally binding obligations under the UN International Covenant on Civil and Political Rights?

Part II – Review of the operation of Anti-Terrorism Bill (No. 2) 2005

The Anti-Terrorism Bill (No. 2) 2005 does not provide for adequate oversight mechanisms. The Bill simply states that the provisions allowing for the issuing of control and preventative detention orders (as well as certain other police powers) are subject to a 10-year sunset clause.¹ The Bill also contains a section providing that the Council of Australian Governments (CoAG) will, after 5 years, review the operation of certain State laws with a corresponding report to be laid before each House of Parliament.² It is unclear, however, what legal implications, if any, this report will have. Indeed, it is particularly unclear whether the CoAG review- report will have any implications for the operation of the 10-year sunset clause provisions.

The lack of effective and adequate parliamentary review of the Anti-Terrorism Bill (No. 2) 2005 stands in stark contrast to the practice in other Western liberal democracies, both with common law and civil law traditions. Since Australia’s antiterrorism legislation is largely modelled on the British legislation, this submission will focus briefly on the review mechanisms in operation in the United Kingdom. It will also summarise briefly the review mechanisms in operation in Germany.

UK Anti-Terrorism Legislation

In Britain, the three major terrorism laws – the Terrorism Act 2000, the Anti-Terrorism, Crime and Security Act 2001 (Part 4)³, and the Prevention of Terrorism Act 2005 – are reviewed *annually* by an *independent reviewer*, Lord Carlile of

¹ Schedule 4, Part 1, Division 104, Subdivision H, s 104.32, Schedule 4, Part 1, Division 105, Subdivision F, s. 105.53, Schedule 5, Division 3A, Subdivision D, s. 3UK.

² Introductory Point 4.

³ The British government repealed Part 4 of the Anti-Terrorism Crime and Security Act 2001 after the House of Lords, in December 2004, declared it incompatible with the Human Rights Act 1998 (and Britain’s obligation under the European Convention of Human Rights). The Part 4 powers were replaced with a system of control orders under the Prevention of Terrorism Act 2005.

Berriew QC. In addition, the Anti-Terrorism, Crime and Security Act 2001 was also reviewed by an *independent committee* of seven Privy Councillors, headed by Lord Newton of Braintree. In December 2003, the Newton Committee submitted a report to the Home Secretary, who was then required to lay it before Parliament. The Committee had wide-ranging powers and was even empowered to specify provisions of the Act, which would be repealed if the Report was not debated by each House of Parliament within six months.⁴

The Prevention of Terrorism Act 2005 also provides for extensive parliamentary review. According to section 14, the Home Secretary must prepare a report about his exercise of the control order powers 'as soon as reasonably practicable after the end of every relevant *3 month period*'. He must then lay a copy of that report before Parliament. The Secretary is also required to appoint an *independent reviewer* (currently Lord Carlile) who oversees the operation of the Act and who produces an *annual* report. Furthermore, the Act specifically provides that the *independent reviewer* comments on the implications for the operation of the Act of any proposal made by the Home Secretary. Consequently, when the Blair government decided to introduce further amendments in the aftermath of the London bombings of July 2005, Lord Carlile, on 12 October, provided an additional report on the new proposals.⁵

Germany's Anti-Terrorism Legislation

Germany's main anti-terrorism legislation, the *Terrorismusbekämpfungsgesetz* of 2002, provides for extensive parliamentary (and judicial) review and oversight. In particular, the Control Committee of the Federal Parliament (Parlamentarisches Kontrollgremium den Deutschen Bundestag) conducts a review of the operation of the anti-terrorism legislation on an *annual* basis. In addition, after 3 years, the Committee issues a comprehensive report that specifically examines whether the law is proportionate and effective in relation to the purposes stated in the legislation. This report has been issued in May 2005. In general, German anti-terrorism legislation is subject to review by the Federal Constitutional Court (High Court).

Yours sincerely,
Christopher Michaelsen

⁴ Privy Councillor Review Committee, *Anti-terrorism, Crime and Security Act 2001 Review*, Report, HC 100 (December 2003).

⁵ Lord Carlile of Berriew, *Report on the Proposals for Changing the Laws against Terrorism*, 12 October 2005; <http://security.homeoffice.gov.uk/news-and-publications1/publication-search/independent-reviews/>.