

# **ADDITIONAL COMMENTS**

## **BY SENATOR LINDA KIRK**

### **Constitutional Validity**

1.1 I have significant concerns about the constitutional validity of aspects of the preventative detention and control order provisions of the Bill. If these are not addressed, there is considerable potential for a successful constitutional challenge to central features of the Bill, undermining its national security objectives.

1.2 Witnesses from the Attorney-General's Department assured the Committee they had received advice from the Solicitor-General and Chief General Counsel for the Commonwealth that the Bill is consistent with the Constitution, particularly the requirements of Chapter III. They were not however prepared to provide this advice to the Committee.

1.3 Numerous other witnesses expressed significant doubts about the consistency of sections of the control order and preventative detention provisions with the requirements of Chapter III. These can be summarised as follows:

### **Control Orders – Division 104**

1.4 Witnesses from the Attorney-General's Department submitted that the power to issue control orders is a judicial function, due to its potentially punitive operation, and is therefore appropriate to exercise by Chapter III courts in the exercise of the judicial power of the Commonwealth.

1.5 According to the Law Council of Australia and other witnesses who appeared before the Committee, in giving the Federal Court, Family Court and Federal Magistrates Court the power to make control orders, the Bill potentially confers on these courts non-judicial power inconsistently with the requirements of Chapter III. According to these witnesses, the making of control orders is not in accordance with the judicial process, particularly the rules of natural justice, and is not therefore an exercise of judicial power.

1.6 The constitutional difficulty presented by control orders could be addressed by amendments to the Bill to ensure that the process for making the control orders by the 'issuing courts' is in accordance with the judicial process. This requires an open hearing subject to limited exceptions, the presence of the affected party, and the application of the rules of natural justice and the rules of evidence.

### **Preventative Detention Orders – Division 105**

1.7 The Bill purports to confer the power to issue continued preventative detention orders on Federal Court judges, State/Territory Supreme Court judges,

retired Chapter III court judges or State Supreme Court or State District/County court judges or a President or Deputy President of the Administrative Appeals Tribunal.

1.8 The power to issue preventative detention orders is a non-judicial function and the Attorney-General's Department advised the Committee that their legal advice was that this function could be invested in Federal Court judges in their personal capacity, as *persona designata*. Again, this advice was not provided to the Committee.

1.9 Other witnesses told the Committee that there was the potential that this non-judicial function could be considered incompatible with the judicial role of federal judges and State/Territory judges who may be invested with federal jurisdiction. Witnesses from the Gilbert and Tobin Centre emphasised that this non-judicial function invested in these judges has the potential to 'seriously compromise the integrity, independence and reputation of judicial office, undermining public confidence in the judiciary.'

1.10 The constitutional difficulty presented by this could be overcome simply by removing serving federal and State/Territory judges from the panel authorised to make continued preventative detention orders.

### **Review of Preventative Detention Orders – proposed sections 105.51 and 105.52**

1.11 An application may be made to the Security Appeals Division of the Administrative Appeals Tribunal (AAT) for review of the decision of an issuing authority to make or extend a preventative detention order pursuant to proposed section 105.51. However, such an application can only be made after the order expires. Whereas a person can obtain judicial review (common law and constitutional writs) to challenge the legality of the decision during the duration of their detention, they cannot challenge the merits of the decision to detain until the expiration of the order.

1.12 As the making of a preventative detention order is a non-judicial function, the proper place for merits review of the order is an administrative body such as the AAT. There does not however appear to be any justification for excluding merits review of the order during the duration of the detention.

1.13 There is provision for review and the granting of remedies by a State or Territory court of a Commonwealth preventative detention order in circumstances in which a corresponding state preventative detention order is made under proposed section 105.52. The Court may require that the Commissioner of the Federal Police provide to the Court and the parties the information that was put before the person who issued the Commonwealth order when the application for the order was made. Such information need not be disclosed where the information is likely to prejudice national security within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

1.14 There is no provision in proposed section 105.51 which provides for similar information to be provided to the AAT on a merits review. As the Law Council submitted, the consequence of this is that the AAT would not have the required information to conduct a meaningful review of the merits of the preventative detention order.

1.15 These problems could be addressed by amendments to the Bill which permit merits review of preventative detention orders by the AAT during the duration of the detention. In addition, a provision which allows the AAT to require that the Commissioner of the Federal Police provide to it and the parties the information that was put before the person who issued the Commonwealth order when the application for the order was made. Such information need not be disclosed where the information is likely to prejudice national security within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

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