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11 November 2005

Please Quote: PK01113:GKS

Senator Marise Payne, Chair
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 final form of the Bill will substantially affect the content of any consequent Victorian legislation. The process surrounding the current anti-terrorism proposals has been unusual. Fidelity to due process is critically important to the legitimacy of measures that re-calibrate the balance between liberty and security in favour of security.

Accordingly, having regard to functions in section 58 of the *Information Privacy Act 2000*, I enclose a submission and attachments for the Committee's consideration. The Committee's analysis and any recommendations that affect the final form of the legislation will determine the practical quality of some basic freedoms under law for some years to come for Australians, in particular Muslim Australians.

The submission is based on the version of the *Anti-Terrorism Bill (No 2) 2005* second read on 3 November 2005. Privacy will be affected both by the operation of several proposed measures and by the quality of the oversight of their operation.

Among the attachments are:

- Materials from the comparable and almost contemporaneous UK debate on new anti-terrorism measures;
- advices to ACT Chief Minister, Mr Jon Stanhope from
    - counsel, Mr Lex Lasry QC, Ms Kate Eastman and Mr Stephen Gageler,
    - the ACT Director of Public Prosecutions, Richard Refshauge SC, and
    - the ACT Human Rights Commissioner, Dr Helen Watchirs.

To the extent relevant to privacy, I concur with the analysis and comments of Dr Watchirs. Her reference to Victoria's *Racial and Religious Tolerance Act 2001* indicates how the Commonwealth's actions in this matter may flow on to affect State and Territory laws, with practical consequences for many Australians.

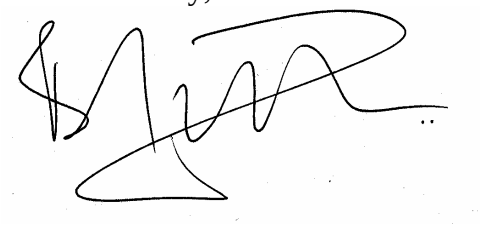
The UK materials include the work of its Independent Reviewer of its *Terrorism Act 2000*. That work itself shows clearly the value of creating a better oversight structure in Australia, in particular by legislating for an independent public interest monitor role, beyond the specific references made to the Queensland Public Interest Monitor made in the current Bill.

In the UK, the Independent Reviewer and the multi-party Newton Committee, have provided valuable suggestions for improving existing anti-terrorism measures, as well as constructive analysis of prospective new measures.

They achieve this without compromising security. Their mere existence, together with the timeliness and quality of their reporting, enhances the legitimacy of any necessary measures that diminish liberty in aid of security. Attention is also drawn to the recent and ongoing debate in the House of Commons, and some excerpts are included in order to illustrate points with equal relevance to Australia.

Should the Committee staff have any queries, please contact Michelle Fisher, Manager Policy on ☏ 03 8619-8737.

Yours sincerely,



PAUL CHADWICK
Privacy Commissioner

Encl.

submission

Submission to the Senate Legal and Constitutional Committee on aspects of the –

Anti-Terrorism Bill (No 2) 2005

November 2005

Office of the
Victorian Privacy
Commissioner

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1. Adverse effects on privacy

Privacy is one element of liberty. It is cherished but fragile. It is recognised in all of the main international human rights instruments. For centuries privacy has been protected by various common law doctrines. More recent specialised statutes also protect personal data. Privacy is an instrumental freedom in the sense that only if an individual's privacy has a measure of protection can he or she exercise, practically speaking, other freedoms, including freedom of expression, freedom of conscience or belief and freedom of association.

Privacy will be adversely affected by the Bill's provisions for control orders, preventative detention, powers to stop question and search, surveillance, warrantless information demands, and compulsory reporting of financial transactions. Each will affect, to varying degrees, the privacy of individuals in relation to whom the provisions are exercised. In many instances, there will also be adverse effects on the privacy of persons who are related to or associated with those individuals.

Privacy has several dimensions. The Bill affects privacy as follows:

- Bodily privacy[1]
- Territorial privacy[2]
- Communications privacy[3]
- Freedom from surveillance[4]
- Information privacy[5]

The Bill should await the result of the independent Committee review of Australia's existing laws, announced by the Attorney-General on 12 October 2005 and due to report back within six months.

2. Assessing whether adverse effects on privacy to aid security are proportional

On information presently available, the necessity and likely effectiveness of the proposed measures in the Bill are matters this Office is not in a position to assess.

Whether the measures are proportional can be assessed by reference partly to the quality of safeguards that accompany the measures. Just as the risk of terrorism is real and acknowledged, so the fact that significant anti-terrorism measures cannot eradicate the risk

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1 Protecting the integrity of one's body from the unwanted gaze or non-consensual touch. See control orders (@104.5, 104.16 & 105.43), preventative detention orders (Subdivision C, Division 105, Part 1, Schedule 4) and powers to physically search persons (@3UD).

2 Security and the sanctity of one's home or property from intrusion or interference. See control orders (@104.5).

3 Protection of one's correspondence, telephone, email, SMS and other communications from eavesdropping, recording and dissemination. See most of the provisions for control orders, preventative detention, obtaining information and documents and the optical surveillance of persons at airports and on flights.

4 Freedom from having one's behaviour and activities observed and recorded by others. See control orders (schedule 4), detention orders (schedule 4) and optical surveillance powers (schedule 8).

5 Controlling the collection and handling of one's personal information. See most of the provisions of the Bill; reporting of financial information, control orders, preventative detention, powers to require information and documents, and optical surveillance in airports and on flights.

ought be acknowledged. Experience in other jurisdictions has demonstrated that terrorist acts can occur despite the existence of measures such as these, or more draconian measures. [6] It will be a matter of balance, and this reality gives weight to the argument that to trade away too much hard-won freedom in pursuit of security that cannot be guaranteed is to give a victory of sorts to terrorists.

In my opinion, the safeguards in the Bill are so lacking the Bill fails the proportionality test. Reasons for this conclusion follow. Some points are augmented in the additional materials. The almost contemporaneous UK debate is cited. Just as the UK appears to have been a model for some of the Bill, so it can be a model for better process in legislating such measures and better oversight of their operation.

On judicial oversight

Credible judicial oversight requires both the separation of the judicial officer from the Executive and an arrangement that does not confer upon a court a function which substantially impairs its institutional integrity. High Court authority[7] is likely to be the subject of separate advice to this inquiry by others, in part to address constitutional issues. It is sufficient here to note that relevant cases tend to deal with circumstances in which individuals previously convicted of offences are to be preventively detained.[8] The Bill contemplates the control or detention of persons not necessarily charged, tried or convicted.

In such circumstances, any arrangements involving judicial officers will need to be particularly carefully constructed to avoid substantial impairment of the institutional integrity of the court from which they are drawn.[9]

The Bill's approach of expressly excluding judicial function and conferring the power on a judge or magistrate in a personal capacity[10] would seem fundamentally inadequate as judicial oversight. It may be oversight of a sort, but it self-describes as not being judicial. The UK debates on anti-terrorism measures, which parallel or pre-figure those now under consideration in Australia, have paid close attention to this issue.[11] I draw attention to the Independent Reviewer Lord Carlile's recent call for further consideration of a hybrid of the European-style examining magistrate and judicial oversight on the Anglo-Australian model.[12] The seed of a practical, acceptable compromise may be found there.

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6 Terrorist acts have occurred in the UK despite similar measures and terrorist acts occur in countries which commonly provide for the preventative detention and incarceration of persons without charge or trial.

7 *Grollo v Palmer* [1995] HCA 26; *Kable v NSW DPP* [1996] HCA 24; *Fardon v Queensland Attorney-General* [2004] HCA 46; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* [2006] HCA 18.

8 As in *Kable* and *Fardon*. In *Al-Kateb v Godwin [2004] HCA 37* the relevant person had not been convicted, but was an unlawful non-citizen in immigration detention.

9 How, for instance, would the characteristics referred to by Gleeson CJ in *Fardon* at para 19 be met?

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

11 See, for example, the House of Lords debate on the *Prevention of Terrorism Act 2005*, the Newton Committee Report, December 2003 [2003 HC 100] and the Report by the Independent Reviewer on *Proposals by Her Majesty's Government for Changes to the Laws Against Terrorism*, 6 October 2005.

12 Ibid., Independent Reviewer, paras 64-69. And see the Newton Reports from para 224. The proposal was raised during the House of Commons debate in the latest anti-terrorism legislation and Home Secretary Clarke acknowledged it, noting that it would mean significant reform.

On control orders

The Bill provides for the making of interim and confirmed control orders which allow for the imposition of grossly invasive conditions[13] on persons without charge or proper judicial oversight for up to 12 months at a time with successive control orders expressly permitted.[14] In practice, a control order may be used to prevent a person associating with friends or family or even communicating with others – for any purpose at all.[15] This seems contrary to Australia's implied constitutional right to freedom of political communication[16] and a strong cultural belief in a right to freedom of association. Control orders represent an invasion of privacy at several levels. Derogations of Australian liberties, particularly deep seated and fundamental ones like privacy, must be weighed carefully against any projected increases in security. Where evidence of that increase is lacking, measures such as invasive control orders remain disproportionate.

On preventative detention

As well as other safeguards, any preventative detention scheme should require that the oversight entity be informed by the authorities seeking the order of the precise geographic location at which the detainee is to be held, and also informed if ever and whenever the detainee is moved to other locations. An appropriate independent entity should have an unrestricted right of access to the detainee at any time without notice to the authorities holding him or her. Legislation should specify that the locations of detention must be within Australia, and within ordinary reach of Commonwealth and State law (for example, not embassy property).

Ample historical and contemporary evidence indicates the need for this kind of safeguard. Mistreatment of detainees is a risk. In the UK debate, the arguments for preventative detention have turned on the need for more time for authorities to process forensic evidence, decrypt data and liaise with international counterparts. Detention is not said to be a way of extending periods of questioning and wearing down detainees. This Committee ought carefully satisfy itself as to the purposes of preventive detention. If it is intended to facilitate prolonged interrogation, safeguards are essential. Nowadays, torture can be outsourced offshore. The potential for insufficiently accountable power to distort the judgment of the persons who wield it is the same in every place in every era. [17] The Bill, as drafted, gives insufficient safeguards.

The House of Commons debate on the UK proposal to increase preventative detention form 14 days to 90 days (eventually settling on 28 days) provides a sustained analysis of the factors to be considered by a Legislature faced with detention without charge proposals.[18]

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[13] Detailed @104.5 and include prohibitions on association and communication, pseudo-compulsory counselling and education and the forcible affixing of tracking devices and collection of personal information.

[14] @104.16

[15] A control order issued in the UK prohibiting a man from using the phone, his computer or even leaving his house was recently contravened when he was admitted to hospital with a medical emergency. He was later charged with breaching the control order.

[16] *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520

[17] Among many examples, that all urge caution, consider the late Steve Biko's case; Argentina's 'disappeareds'; Abu Ghraib, under Saddam as well as more recently; Guantanamo Bay.

[18] Hansard 2-3 November, 9-10 November 2005.

3. Public interest monitor

A specialist independent oversight entity, based on Queensland's Public Interest Monitor[19], would be an appropriate check or balance to introduce into a scheme to confer powers of such significance as those in the Bill. At present, the Bill allows only for the Queensland Public Interest Monitor (PIM). Should the Commonwealth or other States and Territories create their own PIMs, the Bill as drafted will exclude those PIMs from the independent oversight role for which they were created. The additional materials provided with this advice simultaneously describe and, by their very existence demonstrate, the value of such independent monitoring and oversight in the UK anti-terrorism context.

An independent entity, headed by suitably experienced Senior Counsel, would serve at least three purposes:

1) assist decision-makers in particular cases to treat people justly and reduce mistakes, in particular where proceedings are *ex parte* and *in camera*, with a mix of information acquired from intelligence and open sources and limits on what the candidate for control/detention may know;

2) enhance the legitimacy of the measures by showing that theoretical checks and balances can have tangible form (subject to the adequacy of resources and performance); and

3) assist Cabinet and Parliament in periodic reviews of the scheme's necessity, proportionality and effectiveness.

The Bill should be amended to allow for any Commonwealth, State or Territory PIM to exercise the same rights as are currently afforded to the Queensland PIM.

4. Warrantless information demands

The Bill provides for the issuing by police, without warrant, of notices to produce documents relating to a wide range of matters.[20] In every case, authorisation by an appropriate independent entity ought be required.[21] The powers granted under numerous schedules, including schedule 6, are not subject to review and do not sunset.

Failure to protect personal freedoms such as information privacy may lead to unnecessary and unaccountable collections of data and could erode public trust and confidence. All invasive powers, including, if granted, power to demand information without a warrant, should be subject to independent review and sunset after 3 years.

5. Sunset and review

The Bill lacks adequate provision for mandatory, regular, independent review and public reporting.

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[19] Briefly described in Office of the Victorian Privacy Commissioner, Submission to the Victorian Parliament's Scrutiny of Acts and Regulations Committee in relation to the *Terrorism (Community Protection) Bill 2003*, paras 63-67.

[20] Schedule 6, Subdivision C and in particular, ss 3ZQN & 3ZQP.

[21] As in 3ZQO.

The Bill's limited sunset provisions of 10 years is too long and too limited.[22] Any legislation which seriously and adversely erodes personal freedoms, including privacy, should completely sunset and be subject to rigorous review in light of (1) how they have operated in practice and (2) the circumstances at the time of sunset. Sunsetting and independent review are necessary measures to ensure freedoms are not lost for an insufficient increase in security or for longer than necessary. If, after review, the measures contained in the Bill remain necessary, proportionate and effective, they can be renewed. If not, Australians should be rid of them sooner rather than later.

6. Reporting to Parliament

In addition to the matters on which the Bill contemplates reports to Parliament, the Bill ought also to compel annual reporting to Parliament of at least the following:

- Number of control orders sought, number refused, and number made conditionally (as opposed only to the number made[23]);
- Number of preventative detention orders sought, number refused, and number made conditionally (as opposed only to the number made);
- Number of orders for provision of information sought, number refused, and number made conditionally (as opposed only to number made).

The UK public reporting on aspects of the operation of anti-terrorism legislation is better than the Bill's cursory provisions. Other ways to augment reporting to Parliament without adversely affecting the security of techniques or operations exist in related contexts that also involve use of intrusive powers authorised under law.[24]

Any review or meaningful analysis of the Bill's success or otherwise will rely on the proper reporting of its use by authorities. Statistics on similar provisions in the UK are currently being used by the House of Commons to further informed debate over proposed further terrorism laws. Statistics were important to UK MPs during the Committee-stage debate on the current anti-terrorism bill.

Accurate, detailed reporting on the nature and number of powers exercised under the proposed Bill will not affect security, but will be instrumental in future review and analysis of the Bill's effectiveness.

7. Reflections from the UK

Having reviewed the latest anti-terrorism legislation, the Independent Reviewer, Lord Carlile made several recommendations.[25] He has also raised a number of questions[26] in the past. The

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[22] At present, only specific powers sunset after 10 years and only schedules 1, 3, 4 & 5 are subject to review after 5 years.

[23] See eg Bill @105.44.

[24] See eg Office of Victorian Privacy Commissioner, Submission to Victorian Parliament's Scrutiny of Acts and Regulations Committee in relation to the *Major Crime (Investigative Powers) Bill 2004*, October 2004, para 26 g. www.privacy.vic.gov.au, go to Publications, Reports, Submissions.

[25] Proposal by Her Majesty's Government for changes to the Laws against Terrorism, Report by the Independent Reviewer, Lord Carlile or Berriew QC, dated 6 October 2005, London.

entire text of those documents has been included in the materials. Some of the key questions adapted from Lord Carlile's words are:

1. In deciding to detain suspected international terrorists, how far is it appropriate to rely on material which, for reasons of national security and/or safety of sources, could not be used as evidence in a criminal court?
2. Is there sufficient quality assurance of intelligence material relied upon?
3. Is there a sufficiently reliable and robust procedure for the review and disclosure of relevant material to protect persons subject to detention?
4. Does the conduct of hearings in secret and in the absence of the detainee and his representatives lead to unfairness in the result of hearings?
5. Would the availability of a 'special advocate' in hearings provide a sufficient level of protection to the detainee - given on the one hand that the special advocate is privy to the whole of the material in the case and the whole hearing, but on the other that he cannot confer with the detainee whose interests he represents once the advocate has seen the closed material?
6. Would some form of inquisitorial procedure similar to the French system be more suited to purpose and more efficient? Could it be adapted and inserted between the Executive's authorities and any judicial authority in order to refine the safeguards and meliorate the procedural unfairness that is almost unavoidable in terrorism matters?

Recent debate in the House of Commons over the Terrorism Bill 2005 (UK) are of particular relevance. Excerpts from the House of Commons Hansard are contained in the attachments for the Committee's consideration.

The stakes are high. Established freedoms and legal standards are being fundamentally adjusted. More time and effort for safeguards is needed.

This Committee is respectfully urged to keep in front of mind the warning by a leading thinker in this field, following a survey of several historical episodes and not just the current fearful atmosphere:

> Why are liberal democracies so quick to barter away their liberty? The historical record suggests, disturbingly, that majorities care less about deprivations of liberty that harm minorities than they do about their own security. This historical tendency to value majority interests over individual rights has weakened liberal democracies. They usually survive the political challenge presented by terrorism but in the process of doing so they have inflicted enduring damage to their own rights framework. Far from being an incidental menace, terrorism has warped democracy's institutional development, strengthening secret government at the expense of open adversarial review.[27]

Paul Chadwick
Privacy Commissioner
11 November 2005

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[26] Speech by Lord Carlile QC to the Sweet and Maxwell Human Rights Conference, delivered 17 October 2003.

[27] Ignatieff, Michael *The Lesser evil – Political Ethics in an Age of Terror (Edinburgh University Press 2004)* page ix.