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SUBMISSION FOR SENATE LEGAL AND CONSTITUTIONAL COMMITTEE'S INQUIRY INTO THE PROVISIONS OF THE ANTI-TERRORISM BILL (NO. 2) 2005

The provisions of the *Anti-Terrorism Bill (No. 2) 2005* (the Bill) dealing with preventative detention orders are based on the assumption that the issuing of those orders would be an executive function.

Ultimately, only the courts can settle the question of whether that assumption is correct.

However, it may have been safer to prescribe a preventative detention regime that reflects the High Court's determinations in relation to the detention of charged persons. The High Court has held that the initial authorising of detention of charged persons to ensure their appearance in court is an executive function, and that the subsequent adjudgment and punishment of criminal guilt is a judicial function (see *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 28).

In common with the detention of charged persons, the type of preventative detention provided for by the Bill would serve criminal justice purposes and involve the imprisonment of the detained persons.

In the circumstances, the High Court may well take the view that the relevant type of preventative detention cannot lawfully be authorised under the executive power of the Commonwealth unless such authorising is part of a process that leads to adjudication by a Chapter III court as to whether the detention is to continue.

It should be noted that when dealing with any legal challenge to the validity of the proposed preventative detention regime, the High Court would be concerned "with substance and not mere form". Also, the Court would have regard to the general principles involved and any implications for the future in that regard. No doubt the Court would be aware of the current proposal in the United Kingdom to amend similar laws to allow for preventative detention for up to 90 days.

In view of these considerations, there is a significant risk that the High Court will not agree to the proposed preventative detention regime unless it is modified so that any initial authorising of detention (under Commonwealth law) is part of a process that leads to adjudication by a Chapter III court.

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