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

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

Dear Secretary

I wish to express my concerns about the provisions of the above Bill.
Some of these concerns have been put forward far more eloquently and with more expertise by parliamentarians, leading judges and constitutional lawyers and I am taking the liberty of including in this email comments by others as well as my own on the principles involved.
I would like to preface my concerns by stating that I believe strong measures need to be taken to ensure that terrorism is dealt with adequately and firmly and that the underlying causes of terrorism need to be seriously addressed by governments everywhere. However, I believe that existing legislation is adequate to deal with any threats, as evidenced by the fact that police in Australia have so far been able to act effectively to contain such threats.

A. MY OWN CONCERNS ABOUT THE NEW PROVISIONS
1.
a. Is it true that at a previous Senate Committee the then Director-General of ASIO in answer to questioning said that there was no need for additional legislation (or resources) to deal with any future terrorist threats in Australia?
b. If this was the case less than a year ago, in what way has the situation changed that would merit the current proposals?

2.
a. Why, contrary to the current law, are police to be allowed to detain people without intending to proceed with a terror-related charge or any charge?

b. Why is it necessary to allow the detention of a person for up to 14 days, when that person has not been charged with a terror-related crime, or any other crime?

c. Why does the legislation allow for the possibility that the police could hold a person in virtual house arrest, for up to 12 months, when that person has not been charged with a terror-related crime, or any other crime?

d. Why is it necessary that a judge act in a 'personal capacity' rather than as a judge, when the police ask them to extend a Preventative Detention Order?

e. What precisely are the deficiencies in the current powers of the police which necessitate greatly expanded powers?

f. Why has the definition of 'sedition' been so widened that it now encompasses any criticism of the government?

3. I include the text of a Letter (written by me) to the Editor (November 1, 2005), The Canberra Times (not to my knowledge published):

'I am currently reading Solzhenitsyn's "The Gulag Archipelago" and was struck by how insidious the descent into state terror can be.

This is the prospect that faces us now with the anti-terrorism measures that the Howard Government is proposing.
Even though Solzhenitsyn is writing of the horrific inhumanity of Stalinist Russia and the terror system used to maintain control his words ring true today: "Just as people transmit an epidemic infection from one to another without knowing it, by such innocent means as a handshake, a breath, a handing something, so, too, they passed on the infection of inevitable arrest by a handshake, by a breath, by a chance meeting in the street. For if you are destined to confess tomorrow that you organized an underground group to poison the city's water supply, and if today I shake hands with you on the street, that means I, too, am doomed." (my emphasis)

Solzhenitsyn writes later: "If it were possible for any nation to fathom another people's bitter experience through a book, how much easier its future fate could become and how many calamities and mistakes it could avoid. But it's very difficult. There is always that fallacious belief: ' It would not be the same here, here such things are impossible.' '' (my emphasis again)

Are we going to blithely say "It could not be the same here" or are we going to look back in the years to come and realise that it was the Howard Government's Anti-Terror legislation that set us on the path to tyranny?'

B. CONCERNS EXPRESSED BY OTHERS ON SECURITY PROVISIONS
1. In another but similar context the Leader of the Liberal Democrats in the House of Commons, Hon. Mark Oaten, expressed opposition to the Blair Governments anti-terrorism proposals despite the fact that there had been a recent direct terrorist outrage in London:

Comments by Hon. Mark Oaten on the British anti-terrorism measures
26 October 2005

"Like other Members, I start by referring to the events that took place in London during the summer and in doing so pay two tributes. The first is to the intelligence and police forces that handled that three or four-week period with great integrity and received much public support for their management of the process.

"Secondly, I pay tribute to the Home Secretary who dealt with those difficult circumstances with great calm, not only at the time of the attack that killed so

many people but also a few weeks later when the failed attacks took place in London. I also welcomed the fact that, although he was busy and focused, he was courteous enough to include his opposite numbers in the discussions and to keep the Opposition parties briefed. That was an appropriate response and I am very grateful.

“The Liberal Democrats have always acknowledged, even during those long hours in January when we were debating the control orders, that there is a real threat to this country from terrorism. Our cross-party differences have been not about whether there is a threat to London and other cities but about the appropriate response to that threat. We remain convinced that the issues are serious and we do not in any way underestimate the need for a proportionate response. We accept that there is a terrorist threat.

“The issue has always been about the level and balance of the response to the threat. I have thought long and hard about our party's approach to the Bill. Any responsible politician wants to introduce measures that will make the country safer and it would be irresponsible not to look at measures that could make all of us safer as we walk through the streets of our cities. I was very taken with the Prime Minister's remarks, at press conference after press conference, about civil liberty and the principle of freedom that we should be able to walk freely without fear of attack. Of course we support that. However, as politicians we also need to argue for other freedoms and civil liberties and for the important principle that we do not hand the terrorists a backhanded victory by doing away with our strong principles of justice.

“When the bombings took place in London, people said time and again that they did not want the bombings to change their way of life. From that, I drew the conclusion that they wanted sensible measures to make their lives safer but that were not so draconian as to change the way that they lived their everyday life.

“It was right that the three parties came together during the summer to try to achieve consensus. At that point, the public wanted their politicians not to disagree, but to work together and try to find a way forward. We made much progress in agreeing and signing up to three measures that are in the Bill and still have our support. However, during September, problems emerged, as the Home Secretary said, when the Government decided to go further than the three measures to which we had agreed.

“Our party felt that a wide, sweeping new offence of glorification was unacceptable, too hard to tie down in law and would infringe freedom of speech. We also felt that the principle of holding people for three months without charge was a step too far. It was at that point that the consensus began to fall apart. I welcome the fact that the Home Secretary has thought again about the provisions on glorification. The removal of the former clause 2 is extremely welcome, but will he go one step further and address the use of glorification in clause 21? It seems to be very much used as it was in its previous incarnation as one of the grounds for banning organisations. If there could be the same movement on the use of that word as occurred in clause 2, I should certainly welcome it. In substance, we support a large amount of the legislation. We are left with one significant objection about which I shall speak later.

“I reiterate the point I made in my intervention. I understand the Home Secretary's irritation at our decision not to support the Bill this evening. I repeat that we are determined to try to get consensus back on track in

Committee. We want to persuade the Home Secretary and the Government that there are alternatives to holding suspects for three months. However, he needs to understand the strength of feeling about the issue in my party and why we felt that rather than waiting to show our objections on Third Reading if those provisions remain unchanged we had to send the Government the strongest possible signal that, if things stay the same and the clause remains in the Bill, we could not support it. That is why we felt that it was right to make that stand tonight. However, our commitment to try to resolve the issue and our commitment as a party to support a changed and modified Bill on Third Reading remain.

“The decision was difficult because there is much in the Bill that I support and much of it has been subject to talks. At the end of the day, however, I took a judgment and my colleagues agreed we debated it at the party conference and we felt that we could not support a Bill that included such a provision. I would have found it extremely hard to abstain or to support something that included a provision with which I fundamentally disagreed. The honest thing to do in those circumstances is to take the position that we have taken. I regret only that it could be interpreted as our wanting to wreck the consensus. We do not want to do so. It is a principled position that we hold dear.

“In Committee, we shall want to look at the whole question of intent and when I talk about the indirect incitement provisions I want to look at how both intent and likelihood are built in, so I shall address those points when I get to that section of my speech.

“I want to deal with some of the measures that we support. First, we have long argued that acts preparatory to terrorism should be a criminal offence. We argued that when the Newton committee reported and when we were dealing with derogations from the European convention on human rights. We said that such an offence was a better way of getting suspects into court than holding them without charge. The provisions on acts preparatory have a clear level of intent built into them and that principle should run through the whole Bill.

“Secondly, we very much support the creation of a new offence of training for terrorism although I want to flag up one concern. The Bill also includes an offence of attending a place used for terrorist training. It would be nonsense if, for example, journalists who attended a place of training as part of their investigative work fell foul of such an offence. We need to tidy that up in Committee.

“Thirdly, and more problematically, we support the idea of creating an offence of indirect incitement to terrorism. We support it because there will be occasions when people with some influence will be able to use either written or spoken language with the clear intention of encouraging others to commit a terrorist attack. That should be an offence in this country. The problem is that the clause, and the criminality of the statement, depend on the interpretation of a third party, not the statements themselves or the intentions of a publisher. It depends very much not on what somebody says but on how other people react to what they say. We have concerns about the provision, but we broadly support it.

“It would be extremely helpful if some safeguards could be included. At present, the offence is modelled on the proposal of the Council of Europe convention on the prevention of terrorism, which was signed earlier this year. Under that convention, there are two key safeguards: first incitement must be intentional

and, secondly, there must be the likelihood of a terrorist attack as a result. As we explore the matter in the next couple of weeks, it would be helpful if we could move back towards that model and build into the Bill those sensible twin safeguards that are already enshrined in the European convention on the prevention of terrorism.

“As I said, those matters have our broad support, but before I address our key difficulty with the Bill, I want to touch on the definition of terrorism itself. We have debated the way in which we define terrorism and it is my general view that the current definition is too wide. The Home Secretary helpfully wrote a note to the shadow Home Secretary and me yesterday in which he outlined his arguments for why bluntly he thinks that that definition is probably the best one in town and we should thus probably try to stick with it. He said that the definition was very close to that drawn up by the EU in 2002, but I am worried that there is an important difference between the Home Secretary's definition and that of the EU.

“Under the Home Secretary's definition, there could be circumstances in which animal rights groups and groups such as Greenpeace could fall foul of terrorist legislation, as he acknowledged in one of his recent Select Committee appearances. The EU definition includes the phrase: "extensive destruction . . . likely to endanger human life".

“Tagging on that additional phrase is helpful by making an attack on property or a field a separate issue. The EU phrase would clearly add an extra layer to the definition that would give confidence to people like me who are worried that the definition of terrorism being used is too broad. I am not suggesting that it would be easy to redefine terrorism, but the small EU addition would go some way towards improving our definition of terrorism, which we would all like to see better defined.

“I turn to our major concern, which the shadow Home Secretary outlined in detail: the provisions of clause 23. Why is the question of holding suspects for such a long time a key principle for this party? Article 40 of Magna Carta says: "to no man will we deny or delay justice or right".

“That has been an established principle of our criminal justice system for some 800 years. That principle of liberty has been adopted across the globe. Indeed, article 40 of Magna Carta is the forerunner of article 6 of the European convention on human rights, which says: "everyone is entitled to a fair and public hearing within a reasonable time".

“To put it simply, as long as we have had justice in this country, that principle has been at the heart of it.

“We do not believe that there is a case for moving beyond 14 days. When we discuss how we move forward on the matter, we should not have some kind of auction for 90, 60 or 28 days. We wish to persuade the Government that there are alternative approaches that suggest that we do not need to go beyond 14 days.

“We have been cautious about the number of days for which a person may be held for decades. The police have the automatic power to hold individuals for 48 hours, with a possible time extension of up to four days for serious cases such

as murder. A complex murder case is allowed a time extension from 48 hours to just four days. Of course, provisions passed in 2003 extended the time limit for terrorism cases from seven to 14 days. We have rightly trodden carefully when changing the time limits. The history of the changes shows that we have been cautious, which is why it is remarkable that it is suggested that we could suddenly smash that approach apart under the Bill and move to a 90-day period.

“Let me acknowledge that I think that the police have made a case. I shall go through the police's arguments one by one and outline how we could find an alternative measure.

“The police's arguments were neatly set out by Andy Hayman, the deputy commissioner, in a letter to the Home Secretary that he made public. In essence, it listed eight compelling reasons why we should move towards a time period of 90 days. Some of the problems could be easily overcome, while several points have merit.

“One argument was that suspects needed to be allowed time for religious observance. It is frankly ridiculous to suggest that a person praying five times a day will hold up an inquiry to a great extent. Two of the five prayers take place before sleeping and after waking, when no questioning would take place anyway. This country's questioning system already allows a suspect a 15-minute break every two hours, plus an additional 45-minute break. Surely there is adequate time in the current system to allow for such observance.

“The police's second argument related to interpreters. I understand the Home Secretary's point that it might be difficult to track down interpreters for such cases, but surely there are other ways to solve the problem, such as training and finding new interpreters and using interpreters who are already involved in the immigration process. Is the problem with interpreters so real that we should be prepared to break such a strong principle? Surely the answer is no.

“A further argument in the police's list of eight was that there could be problems with clarifying a person's identity, but, believe it or not, one does not need a person's correct name before charging them. Indeed, it is an offence for people to withhold their names anyway, so that issue can be overcome.

“I now turn to the four matters on which I have made it clear that the police have a genuine case. The police are justified in saying that it would be difficult to deal with forensic evidence, encryption, mobile phone records and the international data trail in a 14-day period. However, we think that there are other ways in which those difficulties could be overcome.

“The first way is that raised by my hon. Friend the Member for Somerton and Frome (Mr. Heath) during an intervention. The Bill creates the kind of offences that could be used as a tool to charge individuals within a 14-day period. I was grateful for the Home Secretary's acknowledgment today and during his appearance before the Home Affairs Committee that he wants to consider that matter. I acknowledge that there are two problems with moving towards that position. First, such lower charges could have a bail attached. Secondly, it is currently difficult to interview someone after they have been charged. However, both those problems can be overcome. As the shadow Home Secretary said, there must be a way in which we can deal with those difficulties by, for example, changing guidelines under the Police and Criminal Evidence Act 1984 to see whether or not

lower offences should have bail attached. Making such changes, as the right hon. Gentleman said, is a lesser change than those that have been proposed. I believe that the Attorney-General is looking at these issues and, if we can speed up that review, it will be tremendously helpful in finding a way forward. If the Home Secretary suggested that changes were made to allow individuals to be charged with lower offences it could be argued that some individuals would not fall into that category, as they could not be charged with a lower offence. I find that argument questionable. If the police decide to arrest someone, they must have grounds and evidence for doing so. I find it hard to believe that there are circumstances in which such evidence could not be used to charge someone with an offence.

“There will be few occasions on which individuals cannot be charged with a lower offence. If the police had arrested someone but could not employ the evidence that they had used for arrest to charge them with an offence, a change in the Government's policy on intercept communication would be key. I accept that there is a narrow category where information from intercepts could not be used to create lower-order offences, which is why the Government should move to allow intercepts to be admissible. That would allow us to deal with the problem.

“I am arguing that someone could be charged with a lower offence or one of the new offences that we are creating. If such a charge is brought within 14 days, I support the police having the opportunity to continue questioning that individual. I do not completely agree with him, because doing so would be intellectually wrong. We are arguing that, having brought that initial charge, the police can continue to charge and work to achieve a higher offence at a later date.

“Checks and balances are required if we move to the model that I have outlined, and PACE guidelines that acknowledge that changing process are obviously required.

“I wish to suggest another way forward to the Home Secretary. Even if the alternatives do not fit the profile of the individual whom the police want to hold and arrest, the right hon. Gentleman has the power of control orders, which we debated at length at the beginning of the year. While I find the way in which control orders are put in place problematic, I accept that there will be rare occasions when it is difficult to charge someone, and control orders are then a useful tool. If all the alternatives are tried, but none of the lower offences works, the use of control orders would be a better way to tackle the problem than holding individuals without charge for a long period. Those control orders, however, would be different, as the clear intention is to move towards a point where a charge could be brought. They would not be open-ended orders without any prospect of charge.

“In conclusion, it is clear that there is potential to find a way forward on differences that have emerged over the 90-day issue. I accept that the police have a compelling case in four instances, but I do not accept that that case should lead us to break many of this country's long-held principles. I hope that in Committee and on Report we can work with the Home Secretary and the shadow Home Secretary to find a sensible alternative. That is our commitment, but if the Government continue to pursue the prospect of holding individuals in this country without charge for three months we cannot, and will not, support those measures.”

2. Comments by Mr Justice Nicholson on the Australian proposals
While some members of the Committee may disagree with various political comments he makes the legal issues he raises demand serious consideration:

The Role of the Constitution, Justice, the Law,
the Courts and the Legislature
in the context of
Crime, Terrorism, Human Rights and Civil Liberties

An Address to The Post-Graduate Student Conference

Transgressions – Intersections of Culture, Crime and Social Control

The Post-Graduate Criminology Society
234 Queensberry Street Carlton
4 November 2005, The University of Melbourne

by

The Honourable Alastair Nicholson AO RFD QC
Honorary Professorial Fellow,
Department of Criminology, The University of Melbourne

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”
Article 10 The Universal Declaration of Human Rights (1948)

“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”
Article 14.1 The International Covenant on Civil and Political Rights (1966)
“Putting people under house arrest for a year by a control order is tantamount to jailing people without trial. This is a shocking departure from Australia’s proud tradition of protecting individuals from an overly powerful state”
(Brad Adams, Asia Director at Human Rights Watch)
Posted 4 November 2005 at
From the time that I chose this topic until it was introduced into the House of Representatives yesterday, the actual content of the proposed Anti-Terrorism Bill (No. 2) 2005 (Cth) has been a moveable feast. Also, so much has been said that there is some difficulty in avoiding the covering of ground that has been already well covered.

Therefore I thought that today, after addressing the broad subjects encompassed by the title of this address, I would devote some particular attention to several issues that do not seem to have received a great deal of attention in the course of the debate. There are many other areas of great concern, including the proposed sedition laws, the curtailment of the rights of freedom of speech and association, the increased powers of the police and the limitations upon

legal representation that have all been extensively discussed in the media. If I were to attempt to cover all of them, this address would become interminable.

The particular matters that I will discuss are these.

Having sat as a Judge of the Supreme Court of Victoria for six years, followed by 16 years as the Chief Justice of the Family Court of Australia, I would first like to offer some thoughts on the role of judges and other judicial officers such as federal magistrates who are called upon to deal with this legislation. This includes one controversial aspect that is termed “judicial review” and in this context it is important to be aware of what ‘judicial review’ means. It does not mean a re-examination of the decision in question on the merits unless the legislation specifically requires that. It normally means a review to examine whether the decision-maker has acted lawfully. Therefore the judge undertaking such a review is not entitled to substitute his/her own opinion for that of the decision maker, but merely examines whether the proceedings have been conducted according to law. A good example of the restrictions of this type of judicial review can be found in the migration area, where successive governments have so limited the powers of the judiciary that the ‘review’ is often almost illusory. It is likely that the same can be expected with this legislation, subject only to concessions that the Prime Minister has been forced to make in order to satisfy State and Territory concerns and the concerns of his own back bench, the detail of which has only just come to hand.

This Bill now does contain some provisions for review on the merits which is to be welcomed but it still lacks the normal attributes of judicial proceedings, including the delivery of reasons for decision rather than a mere statement of the grounds of decision that the Bill now requires and rights of appeal. Further the secrecy that surrounds the process is the antithesis of justice as we know it it in our community, an essential aspect being that it is public and accountable.
The second area I will examine are some human rights and civil liberties issues that have not received a great deal of attention and particularly the position of children. The context for the particular matters I raise is that the Bill makes no reference to the principle that restrictions on rights be read in accordance with Australia’s obligations under the International Covenant on Civil and Political Rights, the UN Convention on the Rights of the Child, and other human rights treaties.

However, before I get to those specific issues, it is necessary to discuss the more general issues covered by my topic.

The Proposed Legislation
The trigger for this discussion is the Howard Government’s proposed anti terrorist legislation which is usefully summarised in an article by Wanda Fish. In the interests of brevity I have omitted the author’s comments under each head, but commend them to those interested.
“1. Control orders: ‘People who pose a terrorist risk’ will have year-long control orders placed on them. Tracking devices, travel restrictions, and ‘association restrictions’ are included.

2. Preventative detention: ‘suspects’ can be detained for up to two weeks without charge. This step by-passes the judicial system and would have been unconstitutional if enforced by the Australian Federal Police. State police will

be able to detain ‘suspects’ who might have information or might be intending to commit a terrorist act. (The new proposal varies this as discussed below)
3. Notice to produce: The AFP may request and obtain virtually any information on any citizen under the banner of ‘national security’.

4. Access to passenger information: Provide access to airline passenger information for ASIO and the AFP.

5. Extensive stop, search and question powers: Federal police will have the power to stop, search and question any citizen whom they believe ‘might have just committed, might be committing, or might be about to commit a terrorism offence’.

6. Extending search and interrogation powers to state police at transport hubs: People at bus stops, taxi ranks, railway stations, and airports can and will be subjected to random searches and the subjective judgment of police.

7. ASIO warrants regime: ASIO search warrants will be extended from 28 days to three months, while mail and delivery service warrants extend from 90 days to six months. Moreover, ASIO will be able to remove and keep anything they take from premises that have been searched ‘ for as long as needed’ for purposes of security.

8. Create new offences: The existing sedition offence will be scrapped, and replaced with the broader, new crime of ‘inciting violence against the community’.
9. Strengthen offences for financing terrorism or providing false or misleading information under an ASIO questioning warrant. The right to remain silent is removed, and anyone refusing to answer questions can be imprisoned.

10. Criteria for listing terrorist organizations will be extended. Organisations that ‘advocate terrorism’ can be banned.

11. Citizenship: The Government will extend the waiting period for citizenship from two to three years and will refuse citizenship on ‘security grounds’.

12. Terrorist financing: More invasive processes to ensure that charities are not used to fund ‘terrorist organisations’ will be extended to institutions and couriers involved in the process.”
The public has had no chance yet to consider the Bill which was introduced into the House of Representatives yesterday, with amendments arising from backbench consideration. I have only had the chance to examine the tabled version briefly, but to the extent it has been possible, my remarks address what we know at the present time.

The Absence of a Bill of Rights in Australia

In considering this proposed legislation, it is important to remember that in Australia there is no effective human rights framework surrounding the new anti-terrorism legislation. Unlike other western democracies, we have no Bill of

Rights and therefore no check upon extreme legislation of this type other than what can be found in the Constitution.

Similarly, unlike European countries including the UK, we are not party to any binding international instruments such as the European Convention on Human Rights and its five protocols, which enable European citizens to appeal to the European Court of Human Rights if domestic legislation or law is thought to be in breach of that Convention.

Additionally, the UK has passed human rights legislation of its own as have Canada, in the form of a constitutional Charter and New Zealand. The US has its own 18th century Bill of Rights, which nevertheless continues to provide real protection against governmental excesses.

There are differing models to be found of this type of legislation but the better models enable the court to read down legislation so as to be compatible with human rights requirements, or if this cannot be done, strike down the legislation.

This is a vitally important distinction that must be borne in mind in considering the new legislation, particularly when its proponents seek to draw parallels with legislation elsewhere. Even when such a comparison is made, the English legislation, despite the threat of terrorism in that country, contains more human rights safeguards than ours. As David Neal writing in The Australian newspaper this week said:
“The English Prevention of Terrorism Act 2005 adopts just that model for control orders. The police apply for a control order at a preliminary hearing in the absence of the person in question. If a control order is made, there must be a full hearing within seven days.

Before the full hearing, the police must place all relevant evidence before the court and -- subject to security -- they must provide the controlled person with a copy of that evidence.

The controlled person must also provide his or her evidence and then the full hearing takes place. If the court confirms the order, there is a right of appeal on the basis of legal error.

Extraordinarily, given that the English legislation is supposed to be best practice and the model on which the Australian bill is based, the Anti-Terrorism Bill 2005 contains nothing of the sort.

Why is a full hearing possible in England -- with all the threats it faces -- but not in Australia?
One might surmise that in England the Legislature was forced to have regard to human rights norms in preparing this legislation.

The Australian Constitution and the Separation of Powers
In comparison, the Australian Constitution contains no significant human rights clauses and the few that are there have been so read down by the High Court as to be almost meaningless. Overall, I consider it is a somewhat weak and doubtful reed upon which we can rely in seeking to protect our freedoms.

One relevant safeguard that it does contain for present purposes relates to the separation of powers as between the Legislature, Executive and the Judiciary. The purpose of this doctrine is to ensure that no one of the three institutional pillars of government has absolute power and that each branch will provide a check and balance on the other. One way of ensuring this is to provide for a non-elected judiciary, who will not be swayed by the need to pander to popular opinion as the legislative branch may well do and is doing, in relation to this legislation. It is interesting to note that the fact that the judiciary is non-elected is now used in a pejorative sense, but it is really fundamental to the working of our system and makes it much more difficult for the Executive and the Legislature to manipulate it than would otherwise be the case.

The separation of powers doctrine is not widely understood by the public or by some commentators, as is apparent from a recent article by Janet Albrechtson in The Australian newspaper.

It is also not a concept widely understood by Australia's political leaders from the Prime Minister down. We have recently had the spectacle of all of them, including the Labor leaders of the six States and two Territories agreeing to some of the most draconian legislation ever passed by an Australian Parliament without considering the possibility that it might be unconstitutional. This came very much as an afterthought subsequent to the making of the agreement and only because one of them, Jon Stanhope the Chief Minister of the A.C.T., had the courage and political decency to let us - the public - into the secret of the enormity of what was proposed. In the case of the Prime Minister what is even more troublesome is that he apparently did have advice to this effect from Mr Henry Burmester QC that he chose to ignore and not to disclose to the public or to the Premiers and Chief Ministers.

We have since had the spectacle of all of them seeking legal advice, apparently (except in the case of the Prime Minister) for the first time and making rapid changes in the hope of avoiding a constitutional challenge. As you would be aware, the High Court of Australia is the final arbiter of the constitutionality or otherwise of legislation. It is not empowered to give advisory opinions and thus a ruling could only come in a proper case on enacted legislation that is brought before it.

In circumstances such as this is it is worthy of note that what is proposed is a papering over to meet what are seen as technical difficulties, not an attempt to address the principles embodied in the doctrine of separation of powers. Again with the honourable exception of Jon Stanhope, they have framed their somewhat anaemic disputes with the Federal Government in terms of what are almost irrelevant concepts relating to 'shoot to kill' and their issues do not appear to be principled but rather pay lip service to the adopting of an independent position without really doing so.

We can therefore expect the proposed judicial review to be the minimum thought possible to satisfy constitutional requirements. Indeed Jon Stanhope, who unlike most of us had then seen the new draft legislation, said on Wednesday that he considers it still to be at risk of constitutional challenge. That would also appear to be the position of a former long serving Solicitor General, Dr Gavan Griffith QC, who said recently in an ABC interview:
"I regard it as very questionable for judges and courts to be involved at all in any aspect with respect to these warrants and detention orders. They're

essentially just providing an administrative practice for administrative detention. And there's no obvious role for the judiciary to come to give a, as it were, a cloak of legitimacy to matter which essentially are not judicial."

The 30 October legal advice provided to the A.C.T Chief Minister by Lex Lasry QC and barrister Kate Eastman warned that:
"Continued preventative detention orders may be made by a wider range of persons: clause 105.2. It is not apparent that a wide range of persons who may make the orders will serve to protect human rights. Some of these persons may be not be subject to judicial review as officers of the Commonwealth for the purpose of section 39B(1) of the Judiciary Act 1903 (Cth)".

Having had the opportunity to very quickly read the legislation, I agree with those views. It is true that the Prime Minister has agreed to a 'merit review' of preventative detention orders (whatever that may mean), within the 48 hour period of their application, but that has serious deficiencies..

Similarly with control orders, it appears that the initial order will still be made without notice but will be an interim order, with a final order being made as part of some sort of judicial process. The problem still remains that no crime will have been committed and there is no indication as to how far and to what extent can the subject of such an order test it before a court or exercise rights of appeal.

A final feature of the doctrine of the separation of powers that I would highlight is that the use of a corresponding State, Territory and Commonwealth legislative framework for the anti-terrorism laws introduces a particular uncertainty. Even if the Commonwealth legislation proves to be unconstitutional, that may not apply to the State legislation. Complex issues would arise involving consideration of what courts have been asked to do, and fundamental concepts such as "integrity".

Justice and Law
What then of justice and its relationship to the law? It is my primary contention that in introducing this legislation the Government has abandoned justice as an object of its laws and has thus rendered them intrinsically bad.

The interrelation of justice and the law is a concept that has bedeviled philosophers and scholars since the times of Socrates and Aristotle. What I think can be said is that one of the objects of law must be the achievement of justice. It may have other objects but if justice is not one of them then it is likely to be bad law. A useful discussion of the problem for present purposes is contained in Paton on Jurisprudence as follows:
"….we must distinguish clearly between justice and law, for each is a different conception. Law is that which is actually in force, whether it be evil or good. Justice is an ideal founded in the moral nature of man. The conception of justice may develop as man's understanding develops, but justice is not limited by what happens in the actual world of fact. It is wrong, however, to regard law and justice as entirely unrelated. Justice acts within the law as well as providing an external test by which the law may be judged, e.g. justice emphasizes good faith, and this conception has greatly influenced the development of legal systems"
Justice is a concept that we instinctively understand but sometimes find difficult to identify in words. It is not capable of a fixed definition because what is regarded as justice will vary from time to time and from community to

community. It has been defined as the quality of being just or fair and thus as being synonymous with fairness. However I think that this is to gravely understate the power of the concept of justice. I was interested in this regard in a view expressed not by a lawyer but by a philosopher, Professor Raymond Gaita when he wrote:
"Acknowledgment of someone as fully human is an act of justice of a different kind from those acts of justice which are rightly described as forms of fairness. Fairness is at issue only when the fully human status of those who are protesting their unfair treatment is not disputed. When they centre on the distribution of goods or access to opportunities and such things, concerns about equity presuppose a more fundamental level of equality of respect. If you are taken as fully 'one of us', then your protestation that equity demands that you receive higher wages or be granted better promotion prospects, for example, is probably an appeal to justice as fairness. If, however, you are regarded as sub-human, then it would be ludicrous for you to even consider pressing such claims, unless as a device to dramatise the radically different kind of equality that is really at issue."

Gaita was there speaking about Indigenous people in the context of the High Court of Australia's decision in Mabo v Queensland, which recognised that there was a law prior to white settlement and discarded the odious doctrine of terra nullius.

I think that similarly with these laws, they proceed upon a basis that those suspected of terrorism are regarded as sub-human and therefore having no entitlement to justice. Quite obviously, as government and media thinking goes, no-one has much sympathy for terrorists, particularly if they are probably Islamic and therefore alien to popular culture. However we tread a very dangerous path when we take this approach, as the real test of a free society is how it treats its minorities.

It is of course clear that justice and law are not synonymous. Law can be extremely unfair and unjust, either intrinsically because it is a bad law, or because it has unexpected ill effects in certain circumstances and/or in its application by the Executive and/or by the courts. What we are discussing today is a very good example of very bad law and one of the reasons why this is so is because these laws have no relationship with justice but rather with a perceived fear of the unknown that has been used to frighten the populace into thinking that they are necessary. The article by Janet Albrechtson to which I have referred, speaks of a level of hysteria amongst those, like me, who are critical of the laws. I think an examination of the same issue of the Australian would give a clearer picture of the source of any hysteria in this debate e.g. 'ASIO fears terror cells among us'; 'Terror threat identified, says PM'.

In such circumstances, the fact that the laws are unnecessary, or that it has not been demonstrated that they are necessary, seems to have been completely ignored by their proponents. Hugh White in a recent article in the Melbourne newspaper The Age put this into perspective very well when he argued that no convincing material has been advanced as to the necessity for these laws. We are expected to trust undisclosed security briefings delivered to a select few. Trust becomes extremely difficult following the Tampa, the Siev X, the 'children overboard', and the 'weapons of mass destruction'.

The achievement of justice and fairness once occupied a primary position in our society. I liked to believe that they were part of the Australian ethos and that they applied universally. Unfortunately that is no longer the case.

The Role of the Courts

I turn now to the courts. Once again it is important to emphasise the lack of a human rights context in this regard. Without laws to protect human rights the role of the courts is a very difficult one and our traditional belief in the role of the courts as guardians of our rights is greatly hampered by this fact. To this must be added what has been a fairly obvious attempt to change the balance of power in the High Court by the Howard Government, an approach which is now seen to have legitimacy in conservative circles as recent events in the United States have shown.

In a speech that I delivered in Hobart this year on this and related subjects I said:

“Justice is indeed in a sorry state in this country when that court, albeit by a narrow majority, held in Al-Kateb’s case that it was constitutionally open to the legislature to authorise the executive to hold people in detention indefinitely. The approach adopted by the majority in that case was that of legal technicians, rather than independent judges.

The judgment of the Chief Justice, Murray Gleeson bears reading in that case. Hardly a social radical, it proved too much for him to stomach that an Act of Federal Parliament should be read so as to authorise the indefinite detention of anyone unless it was expressed in the clearest terms. He said:

Where what is involved is the interpretation of legislation said to confer upon the Executive a power of administrative detention that is indefinite in duration, and that may be permanent, there comes into play a principle of legality, which governs both Parliament and the courts. In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. That principle has been re-affirmed by this Court in recent cases It is not new. In 1908, in this Court, O'Connor J referred to a passage from the fourth edition of Maxwell on Statutes which stated that "[i]t is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness".

Unfortunately, four of his colleagues took a different view.”

I was there referring to a 2004 decision of the High Court of Australia where a majority of the court held to be constitutional certain provisions of the Migration Act that permitted the indefinite detention of asylum seekers. I concluded from this that in the absence of a Bill of Rights there was no reason to suppose that the High Court would necessarily strike down equally abhorrent legislative provisions directed at Australian citizens.

That view has since been strengthened by Justice Michael McHugh, a judge who formed one of the majority in that case and who has said in a speech at Sydney University:

“There is one area of law that provides fertile ground for the legal agitator to sow the seeds of legal discontent. It is the continuing failure of this country to have a Bill of Rights. Without a Bill of Rights or a constitutional Convention on Human Rights, the High Court of Australia is not empowered to be as active as the Supreme Court of the United States or the House of Lords in the defence of the fundamental process of human rights. That a judge may be called upon to reach legal conclusions that are applied with ‘tragic’ consequences was brought home by the High Court’s decision of Al-Kateb v Goodwin. There a majority of Justices – who included myself – held that the investing of judicial power in courts exercising federal jurisdiction did not prohibit the Parliament from legislating to require that “unlawful non-citizens” be detained until they can be deported. Al-Khateb highlights that, without a Bill of Rights, the need for the informed and impassioned to agitate the Parliament for legislative reform is heightened.”

The Role of the Executive

The record of the Executive in administering similar legislation to the anti-terrorism legislation is not a good one. The problem about this sort of legislation is that it is likely to lead to a situation where Government and its agencies will use it for other and improper purposes, including its own political ends. Alternatively, those responsible for its administration will bungle its use in such a way that it will have the effect of blighting people’s lives in the same way as the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) has done in respect of many of the asylum seekers under its charge.

If an example of the first type of improper usage is needed, it can be found in the Government’s usage of the existing ASIO legislation to suppress dissent. There are signs that this may already have happened in one case.

On 23 June 2005, SBS television screened the program Truth Lies and Intelligence produced by Carmel Travers. The subject matter of the program largely related to the truth of statements made by President Bush and Prime Ministers Blair and Howard in 2003 justifying the attack upon Iraq upon the basis that Iraq possessed weapons of mass destruction. The program featured interviews with Andrew Wilkie, a former senior intelligence officer with the Office of National Assessments in Canberra.

A chilling fact that emerged was not so much the contents of the program itself, but rather that in the course of making it the producer received a visit from persons purporting to be from the Attorney-General’s Department. These persons demanded access to her computer and apparently destroyed its hard drive. When she attempted to film them doing so, they threatened to charge her with an offence carrying a penalty of 7 years’ imprisonment. Apparently they were seeking information about her communications with Mr Wilkie.

Apart from a brief article in the Sydney Morning Herald on 18 September 2004 and SBS, which also featured the matter on Dateline on 22 June 2005, the only other mainstream media mention of this affair that I have been able to discover appeared in The Age Green Guide, of all places. It emerged from The Sydney Morning Herald article and the Dateline programme that similar actions had taken place in respect of others with whom Mr Wilkie had been in contact, including the well-known commentator, Professor Robert Manne.

One would have thought that such behaviour would have been the subject of media headlines in normal circumstances. This suggests that the media at least, has become inured to governmental attacks upon our liberties, or to take a more sinister view, that it or parts of it are engaging in self censorship. Another possibility is that it was cowed into silence by the relevant provisions of the legislation to which I have referred. It is apparent from the transcript of the Dateline programme that participants were careful to take legal advice as to what they could or could not say.

For an example of the second type of problem, namely the maladministration of legislative power, we need look no further than DIMIA and the findings that have been made about it in two separate independent reports, albeit with very limited terms of reference. This is an example of what can occur when powers are exercised largely in secret and directed against minorities. The failure of the two relevant ministers, Ruddock and Vanstone, to accept any responsibility whatever for what went wrong is a breathtaking departure from long-held understanding of ministerial accountability in a Westminster style parliamentary democracy.

The powers under ASIO and related legislation are all exercised in secret and the responsible minister is none other than Mr Ruddock. In the unlikely event that any evidence of maladministration emerges, given the secrecy provisions of the legislation, Mr Ruddock and the Prime Minister will no doubt wash their collective hands of the matter and blame some junior ASIO operative, or the culture of the Department.

The Role of the Legislature

What then of the Legislature? The seeds of the present problem lie in the Government's newly won control of the two houses of Parliament. Much of the responsibility for this lies with the disastrously ineffective Opposition that we have experienced in this country since 2001. Following 9/11, large sections of the Opposition seems to have lost their collective heads and allowed this country to be manipulated by the Howard led Government, ably assisted by the Murdoch controlled media into a state of fear.

In a speech that I gave recently I said:

"We have since experienced a complete failure of political leadership on both sides of politics that has led to a lemming-like rush by the two major political parties to outdo each other in proposing more and more extreme legislation directed at combating a threat of terrorism in this country.

We have also experienced a further tragic bombing incident in Indonesia which has cost Australian lives and which has already been relied upon as providing further evidence of the need for the sort of draconian legislation that is contemplated.

It should be remembered that we already have security legislation which many people, me included, regard as objectionable. However the attacks in London or Bali will be more than sufficient to justify the desire of governments to introduce additional powers in the name of security. And again in the name of security, in circumstances which are reminiscent of the works of Joseph Heller and George Orwell, the public is prevented from knowing the evidentiary basis which justifies such powers. This is the case with new legislation and also, as U.S. activist Scott Parkin discovered, where the powers are applied to an individual".

I later continued:
“It would appear that our “leaders” have thus managed to undo liberties that have stood the test of time in our community for hundreds of years, all in the name of combating this threat of terrorism. Of course, entwined with concern for the public interest was political self-interest in avoiding the accusation that any of them are seen as “soft on terror”, particularly if there is a future tragedy within our borders which enables conservatives to begin a blame-game directed at leaders who wouldn’t adopt the full precautionary package due to qualms about civil liberties.

The secret status of the intelligence material that secured unanimity with the Federal Government has conveniently ensured that leaders of State and Territory Governments and the Leader of the Opposition can acquiesce with impunity since there can be no informed public debate and thus criticism of them concerning the proportionality or rationality of the security response as measured against threat evidence that is kept under wraps.

It’s a win-win situation all round politically. If Australia escapes a domestic attack, it can be said that ipso facto the civil liberties sacrifices were warranted. If an attack does occur, and no doubt it was this possibility that was of greatest political concern, the stage has been set for there being no weak link in the leadership chain to attract recriminations.

We can expect to see more of this tidy secrecy-based formula in the future and further instances of leaders failing or refusing to heed the warning which issued from within the Federal Government’s ranks by Petro Georgiou; that:

“in the course of defending the democratic values which terrorism attacks, we do not inadvertently betray them”.
I thought at the time that this said it all, but current developments are even worse, as those following the media in recent days would have observed. The Government has stepped up its fear campaign and the Opposition and Premiers have spinelessly not only caved in, but have engaged in the exercise of cheering from the sidelines. How convenient it is that on Wednesday, the Prime Minister announced he had “received specific intelligence and police information this week which gives cause for serious concern about a potential terrorist threat”, making the introduction of a single word amendment to existing legislation so urgent on the day it was introducing its radical new legal framework for workplace relations.
Some, such as Independent House of Representatives Member Mr. Peter Andren, expressed suspicions about the Commonwealth Government’s timing, suggesting political tactics intended to fracture attention to politically volatile bills, and ramping up public anxiety.

Media reporting of this breaking news lived-up to such suspicions by incorrectly injecting terms such as “real” and “immediate” to describe the Government’s new security intelligence, SBS TV Chief Political Correspondent Karen Middleton, was the first commentator as far as I know, to direct scrutiny to the choice and sequence of the actual words used by the Prime Minister on 2 November (with footage showing his visible careful reference to a text); namely, that the threat while based on specific intelligence and information remains “potential”.

I regard the role of the Opposition as even more worrying than the role of the Government. It would appear that a more critical role is being played by the

Government’s own backbench and the Fairfax press than by the Opposition. Even worse is the behaviour of the States and Territories who have delivered a trump card to the Government that may even be sufficient to overcome the fragile protection that the Constitution offers. In an earlier speech I quoted from the remarks of Denise Allen, a former ALP State member for Benalla in which she said:
“The Labor Party I know would have fought tooth and nail against Australians' involvement in Iraq without UN sanctions. They would have protected Australia from terrorism by simply not being party to an illegal war. Their voices would have been loud and would have clearly defined what they stood for. The Labor Party I know would have countered Howard's fear agenda with one of peace.

This climate of fear is Howard's creation and instead of counteracting it with an alternative, forceful, intelligent debate, the Labor Party blindly accepts it and helps promote it”.

Alas, that sort of Labor Party seems to be a distant memory.

I am not reassured, nor am I relaxed and comfortable with the assessment of his Government’s approach that the Prime Minister offered at the press conference that followed the 28 September Council of Australian Governments’ meeting. He there said:
“can I say in defence of the Commonwealth, we were never trying to pull swifties on judicial safeguards. I mean, we do believe very devoutly in the rule of law...”

It is against this sort of populism demonstrated by the Government and supported by the Opposition and the Premiers that the other checks and balances were designed to operate. I think that I have demonstrated that they have failed and that we are definitely entering what senior journalist Geoffrey Barker has described as “the twilight of democracy in Australia”

The Role of the Judiciary
I now want to turn to the role of the judges and federal magistrates who are expected to participate in this legislation. They are put in an invidious position.

In my view such participation would be the antithesis of a proper judicial role. The apparent intention is to provide some check upon the Executive, but I regard it as an illusory check. The judges of the Federal and Family Courts largely formed the view that they would have no further part in the issue of warrants under listening device legislation for the same reason, that the role was not a judicial one. What occurred was that representatives of the police and usually a policeman would attend upon the judge in private and place an affidavit before him/her setting out why such an order should be made. The judge would peruse the affidavit, but would have no way of testing the accuracy of its content and would usually proceed to make an order.

A judicial proceeding involves a fair trial before an impartial and skilled judge at which both parties have an opportunity to be represented by competent counsel and be heard. In a criminal case the issues before the court are formulated by the laying of specific charges against the defendant by the prosecution, access by both parties to all relevant material and the opportunity to test evidence by cross examination and to give evidence in rebuttal. The

charges against the accused person must be proved by the prosecution beyond reasonable doubt. There is an automatic right of appeal to a higher court and further rights of appeal.

None of these rights would appear to be contemplated by this legislation and of course there is no offence alleged. The standard of proof is not the criminal standard but only upon the balance of probabilities and access to a lawyer is limited and the communications between lawyer and client are likely to be monitored. Yet at the same time, the consequences to the person concerned may be equivalent to or worse than to a criminal defendant.
If judges are to be involved in the administration of this legislation, it faces real constitutional difficulties and if they are not, it will be revealed for what it is, namely the greatest attack upon individual liberties and freedom ever perpetrated by an Australian Government.

As Justice Michael Kirby has graphically pointed out:
“The real test comes when judges are led by their understanding of the law, the findings on the facts and the pull of conscience to a decision which is contrary to what the other branches of government or other powerful interests in society want. Something different from what “the home crowd” wants. That is when judicial independence is put to the test”.

The Bill appears to me to raise a real prospect that a judge or other judicial officer will refuse to sit to hear applications under it. The drafters must have had something like this in mind in relation to the original draft when they provided that applications for a control order could be made to a judge in his/her personal capacity.

The problem about this is that if a judge is not sitting in a judicial capacity then he/she is not sitting as a judge at all and the proposal for so-called judicial review is illusory. Also, it may well be that the performance of such a role is incompatible with his/her role as a judge. Further, there is the risk that the judges who would volunteer to carry out this work will not be or will not be perceived by the community to be representative of the judiciary as a whole. This invites concerns about bias and the erosion of public confidence. Another concept that has been introduced is the use of retired judges. Again this is an illusion of judicial involvement. Retired judges are just that and since they would have to be volunteers, it is likely that they would be unrepresentative of even the retired judiciary and attract the same concerns I have raised in respect of serving judges. I for one would not have any part of such a process and I have no doubt that many others would feel the same way.

In relation to detention orders the Bill now provides for a list of people including Federal judges, State and Territory judges and retired judges and others whom the Attorney General may appoint with their consent. In my view this does nothing to cure the problem and may if anything exacerbate it.

On the other hand in relation to control orders jurisdiction is given to a court, including the Federal and Family Courts and the Federal Magistrates Court. It is thus not a matter of judges acting as volunteers and cases are presumably simply assigned to judges or judicial officers in the usual fashion. What would then be the situation if a judge or magistrate refused to hear such a matter on the basis that the legislation under which the application was made was unlawful? Presumably the Attorney General would seek a prerogative writ such as mandamus requiring the judge to hear the application. That then would

eventually go to the High Court but in the meantime, what would be the position of this so called urgent legislation? What also would be the implications for the independence of the judiciary?

I very much doubt that the proponents of the legislation have properly thought this through and the haste that has accompanied it makes this very likely.

Children
I also want to draw attention to an aspect of the legislation that has attracted very little comment, although I notice that it was touched upon in advice to the A.C.T. Government. That is the effect of the new measures upon children.

It impacts upon children in two ways; first directly if they are between 16 and 18 years of age and therefore liable to have some of the laws applied to them; and secondly indirectly if their parent or parents are placed under a control order or detained. In this regard it would appear that Australia is once again acting in breach of the 1989 UN Convention on the Rights of the Child, as it has done consistently with the children of asylum seekers. However this time it extends to our own citizens.

I will first consider the direct effects upon children between 16 and 18. It should be remembered that they are children within the meaning of the Convention.

There is some very limited protection afforded in that control orders are limited to a period of a maximum of 3 rather than 12 months (however there is nothing to prevent successive orders). In the case of detention orders they are entitled to monitored contact with a parent or other suitable person for a maximum of 2 hours per day. Fingerprints can be taken but other identification samples can only be taken if ordered by a Federal Magistrate, or with parental consent and the consent of the child. There are no provisions as to where children will be held or whether they will be held with adult offenders, which itself would breach human rights provisions. Remarkably, it was only as a result of late changes to the draft that it provided for both parents of a detained child may visit the child and that it will not be an offence for one parent to disclose to another parent that the child is being detained.

However, none of this goes even close to compliance with the UN Convention on the Rights of the Child.

The relevant portion of Article 37 provides:
“b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action”

The anti-terrorism legislation by its very nature provides for the arbitrary arrest and detention of the child and severely restricts his/her access to legal assistance and representation as well as severely restricting the right to challenge the legality of the deprivation of liberty. The principle of confinement as a last resort for the minimum necessary period contained in paragraph 37(b) is a critical distinguishing feature of children’s liberty rights. Consistent with the Commonwealth Government’s history of indifference to domestic mandatory sentencing laws which also breach the principle, there is no recognition or reflection of the principle within the Bill.

Looking to the relevant parts of Article 40 of the UN Convention on the Rights of the Child provides finds as follows:
“1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
(i) To be presumed innocent until proven guilty according to law;
(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;”
It is interesting that this Article relates to infringement of the penal laws but it clearly does so upon the basis that no civilised State would consider detaining a child upon the basis of legislation of this sort, which apart from other infringements, abandons the principle that persons must be regarded as innocent unless proved guilty.

In my view it will be a matter of enduring shame that Australia has so ignored the rights of children along with so many other rights ignored by this appalling piece of legislation.

I now turn to the position of children in respect of whom their parents or siblings are affected by control and detention orders. These are children whose

parents have committed no crime, but who, in the view of a secret policeman, may be intending to do so. At one stroke they can be deprived of the company and nurture of their parents and not only that but their father or mother or both may be prevented from earning a livelihood and supporting them. They in turn may be prevented from contact with their parents, brothers or sisters and they have no right to make any complaint public.

The relevant portions of Article 9 of the UN Convention on the Rights of the Child provide that:
“1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.

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4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.”

Article 12 provides:
“1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

The legislation is in blatant breach of these articles, both in respect of children directly affected by the legislation and others.

Concluding Thoughts
I have pondered in my mind why our leaders have embarked upon this dangerous and destructive course. In the case of the Prime Minister he has obviously been influenced by the disastrous policies of his apparent mentor, George W. Bush. At the very time when these policies are starting to unravel, he remains a steadfast supporter.

In this regard he brings to mind another disastrous Liberal leader, William McMahon and his predecessors, who involved this country in an equally disastrous war in Vietnam for largely similar reasons. A particular and dangerous aspect of his personality is his very ordinariness. I have no doubt that he is a perfectly decent individual and he comes across that way. It is hard to believe that when he says something he does not have the best interests of citizens at the forefront of his thinking. Unfortunately his record belies this and his judgment is and has been proved to be faulty. At the same time the Opposition leadership is so spooked and lacking in courage that it is not prepared to challenge him.

The big difference now is the stand of the Opposition, which in relation to the Vietnam War maintained a firm opposition to the war in the face of bad opinion polls and some unsuccessful election results, but was eventually vindicated with the election of the Whitlam Government. This time it has chosen to roll over.

It is apparent that neither side has learned the lessons of history. That is not just a shame, but a terrifying prospect for the future.

What does not seem to have occurred to the proponents of this type of legislation is that the very climate of fear and concern that produces it and which they have assiduously promoted is just what the terrorists want. The enactment of legislation which strikes at our liberties like this confirms to them that for all our talk of freedom and democracy we are no better than them and that the methods that they use thereby gain a measure of legitimacy that it would not otherwise have had.

I think that it should be remembered that this is not a war that confronts us, despite the misnomer of the ‘War on Terror’, but rather the activities of dangerous criminal gangs. These people should be characterised as criminals rather than terrorists, which title gives them a certain cachet and dignity that they do not deserve.

I believe that to characterise them as criminals draws a much sharper distinction between them and members of the community or religious persuasion from which they largely come. It also puts into perspective my concern that the activities of a group of such criminals has panicked us into the taking of extreme measures that are more dangerous to our liberties than the threat posed by the criminals themselves.

Clive Monty
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