Submission to the Senate Legal and Constitutional Committee

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

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Introduction

I am a consultant with 35 years' experience in industry, government and academe. I am a Visiting Professor at leading universities in Australia and overseas. I have been active in relation to public interest matters for 30 years, in various roles. Details of my background and affiliations are at the end of this document.

I have followed successive proposals for changes to the law since 2002. Each has been justified on the basis of being an counter-terrorism measure. I have also undertaken analysis myself, and considered analyses conducted by others. The comments in this document are my own, and do not necessarily represent the opinions of any of the organisations with which I am affiliated.

Summary

The Bill proposes major changes to the balance between the powers of national security and law enforcement agencies, on the one hand, and the rights of Australian residents, on the other.

The extent of the changes is so extraordinary that very strong evidence would need to be provided to justify the need for each change, and to demonstrate how each change would enable the achievement of the claimed outcomes.

No such evidence has been provided. All that is available is vague assertions that the changes are counter-terrorism measures, and that they would be appreciated by the agencies concerned.

In the absence of evidence that is very clear and very strong, the Australian public will reject these proposals.

Senators must do likewise. The future will judge very harshly elected representatives who failed to demand evidence, and failed to protect the population against authoritarian measures befitting a police state.

The Clarity of the Bill's Intentions

The Bill is 140 pages long. It has many parts, which have unclear relationships, variously internally, with other statutes, and with the common law. It is an excruciating read, as a result of its scope, its presentation and its inherent complexity. The'explanatory memorandum' is, like most such documents, little better than a repetition of the content of the Bill.

Crucially, we have not been provided with the affected statutes as they will appear should the Bill be passed. Modern technology makes such consolidated draft legislation readily deliverable. The provision of such documents would enable each of us to achieve an understanding of the effect on the existing text in the affected statutes. There would still be considerable effort necessary, in order to interpret the meaning of the changes, and think through their consequences; but the new text would be a valuable starting-point. The failure to apply such technology is very disappointing.

Further, there have been active attempts to prevent the Bill from reaching the public in sufficient time to enable analysis. And the time made available to consider it has been contrived to be very short. Together, these factors have had the effect of diffusing and delaying the work of analysts and commentators.

The intentions of the Bill are of concern enough. But, as a result of the barriers to understanding that have been created, it must also beassumed that there are many further ill-consequences in the Bill that have not yet come to light.

The Justification

The Attorney-General's statements in the Second Reading speech declared these purposes:

- "to ensure that we have the toughest laws possible to prosecute those responsible should a terrorist attack occur"; and
- "[to ensure] we are in the strongest position possible to prevent new and emerging threats, to stop terrorists carrying out their intended acts".

Scouring the Bill, the explanatory memorandum, the Second Reading speech, the media releases, and the interviews given by the Bill's proponents, yields no explanation as to:

- what precisely is inadequate with existing law; and
- how precisely these measures would overcome those deficiencies.

As various commentators have put it, we have been provided with variants of the mantra 'Trust us'. This is a dangerous enough prescription for the government of a free nation under <u>any</u> circumstances. It is entirely untenable given the nature of the changes proposed.

Control and Preventative Detention Orders

The obligations, prohibitions and restrictions that could be imposed on individuals if this Bill were passed are extraordinarily intrusive. And yet they are not subject to even the most basic controls.

Further, amidst the fog of 80 pages of text, it appears that they are not intended for individuals convicted of serious offences, nor even for those charged with serious offences. It appears that the powers are to be available even if there are no reasonable grounds for suspicion that the person that they're applied to has committed a serious offence.

It is repugnant to a free society for any agency to have the power to make determinations about individuals, and take actions seriously detrimental to the freedom of individuals, without every one of these basic controls in place:

- reasonable grounds for suspicion;
- prior judicial authority;
- tight controls over the use of the authority;
- presentation to an independent judicial officer within a short time after the authority has been exercised; and
- heavy sanctions in the event of abuse.

'Updated Sedition Offences'

There is general public support for ensuring that words and deeds that actively vilify individuals and groups, or that actively encourage violence, are clearly defined to be criminal acts. But there is a strong expectation that existing laws already achieve that end. To suggest otherwise is to accuse the Parliament of having taken insufficient care in its consideration of previous Bills that have come before it.

There is no evidence that there is any need for the amendments to the extent that they relate to terrorism. There is, however, a strong indication that the Government is seeking to use terrorism as a smokescreen for measures that have much broader applicability.

As I understand the Bill, 'seditious intention' includes "an intention to urge disaffection against (i) the Constitution, (ii) the Government of the Commonwealth, or (iii) either House of the Parliament".

To describe Question Time in the House of Representatives as a bear-pit, and less disciplined than the worst school debating tournament, and to propose reformation in order to recover it as a vital element of the democratic process, could easily be interpreted as 'urging disaffection'; let alone calling into question the morality, logic or motivations of an MP or Senator, or a Minister, or perhaps even a government employee.

Further, 'seditious intention' includes "an intention to urge another person to attempt, otherwise than by lawful means, to procure a change to any matter established by law in the Commonwealth".

But "otherwise than by lawful means" outlaws civil disobedience, and moves demonstrations that lack approval into the realms of serious criminal law, punishable by a lengthy period in gaol.

It would also be open to a court to convict a person for sedition for drawing to people's attention the ways in which they can avoid making personal data available to a government agency that had been demonstrated to be untrustworthy (e.g. to the ABS in the context of the new and highly invasive census regime proposed with effect from 2006).

The creation of defences is an utterly unsatisfactory attempt at balance. The Bill would provide this government, and future governments, with the means to oppress individuals and groups by means of prosecutions, and to chill behaviour because of the possibility of such prosecutions being launched. People uttering political comment, including artists and comedians, should not be forced to familiarise themselves with the intricacies of defences that they would be permitted to bring before the courts only after many months of pressure, delay and disruption of their lives, and tens of thousands of dollars of expense.

These provisions have been devised so as to extend far beyond terrorism. They have the clear potential to restrict political comment and debate. Even if it eventually transpired that the courts would not permit wide reading of the provisions, there would have been substantial chilling of speech, not least among the parts of society that already feel less free to make their voices heard.

These are provisions that a free nation would strongly criticise if they were proposed for enactment in an un-free nation. It beggars belief that such terms could be seriously considered by the Australian Parliament.

The Breadth of Opposition

Senior lawyers started out fairly timidly with their responses to this Bill (at least judging by their public statements). As the content became clearer, however, large numbers of the most senior and responsible members of Australian society have made forthright statements about the provisions. A small selection is provided in the Appendix.

Conclusions

I lost a great deal of my time in 1985-87 analysing the ever-varying proposition that was the Australia Card. It gradually became apparent to the public what the then Government, strongly supported by the bureaucrats in the Health Insurance Commission and the Department of Health, actually intended to do. The popularity measure switched from 70% approval to 70% opposition; and people took to the streets.

The measures proposed in this Bill are based on even less justification, and even less appreciation of the consequences, than was the case with the Australia Card proposal.

If passed, in any form, this Bill would seriously undermine the credibility of statutes enacted by the Commonwealth Parliament. That is because public opinion would ensure that it was left on the shelf, untouched. And there it would await some seriously repressive Government, which saw the need, and grasped the opportunity, to fall back on grossly inappropriate powers granted to it by Parliamentarians who were asleep at the wheel.

It is the responsibility of elected representatives to look sceptically on all Bills that come before them. But never is that responsibility clearer or more important than when fundamental liberties are at stake, as they are with this Bill.

Appendix: The Calibre of Opposition to the Bill

- **the only two living former Chief Justices of the High Court**:
  - 'a broad critique of the Federal Government's latest anti-terrorism laws' – **Sir Anthony Mason**, Chief Justice 1987-95, The Sydney Morning Herald, 8 October 2005, http://www.smh.com.au/text/articles/2005/10/07/1128563002789.html
  - "laws impairing rights and freedoms cannot be justified unless they are shown to be needed to target an identifiable, present danger to the community" – **Sir Gerard Brennan**, Chief Justice 1995-98, 24 October 2005, quoted in The Sydney Morning Herald on 9 November, http://www.smh.com.au/text/articles/2005/11/08/1131407637654.html
- **the peak bodies of lawyers in Australia**:
  - "Representing a united legal profession, the Law Council has today publicly detailed its concerns over specific aspects of the Federal Government's draft Anti-Terrorism Bill. Criticising the legislation for its scant regard for civil liberties, the LawCouncil's primary concerns relate to control orders, preventative detention orders, use of force, sedition and legal representation" – **Law Council of Australia**, 2 November 2005, http://www.lawcouncil.asn.au/read/2005/2418318779.html
  - "The Law Society of New South Wales has joined the Law Council of Australia in expressing its outrage over the Government's rush to pass through Parliament the new raft of anti-terrorism laws" – **Law Society of N.S.W.**, 14 October 2005, http://www.lawsociety.com.au/page.asp?PartID=17434
  - "The Law Institute of Victoria (LIV) today joined the Law Council of Australia in condemning the Federal Government's raft of new counter-terrorism measures. Aspects of these laws, which expand on ASIO's already extensive powers, offend all notions of basic civil liberties. They also have the potential to be enforced in a discriminatory way against racial and religious minorities who provide easy targets for random police searches and investigations" – **Law Institute of Victoria**, 9 September 2005, http://www.liv.asn.au/media/releases/20050909_LCCTP.html
  - "Much of this legislationabandons the most fundamental principles one would expect to be inviolable in a liberal democratic society. The protection of individual liberty, the freedom of thought and speech, the absence of guilt by association, and the right to quiet enjoyment of life are the keystones of our democracy" – **International Commission of Jurists**, 17 October 2005, http://parlinfoweb.aph.gov.au/piweb/Repository1/Media/pressrel/73OH60.pdf
- **other eminent lawyers**:
  - "It sounds over dramatic to say that the proposed laws areof the kind that may identify a police state, but let us reflect for a moment on this proposition. The defining characteristic of a police state is thatthe police exercise power on behalf of the executive, and the conduct of the police cannot be effectively

challenged through the justice system of the state. Regrettably this is exactly what the laws which are currently under debate will achieve" – **John von Doussa, President, HREOC**, presentation in Canberra, 31 October 2005, http://www.hreoc.gov.au/about_the_commission/speeches_president/20051101_forum_on_national_security_laws_and_human_rights.html

- "[I'm] stunned that any Australian government would contemplate the proposals for preventive detention and control orders. These laws are striking at the most fundamental freedoms in our democracy in a most draconian way" – **Elizabeth Evatt**, former chief justice of the Family Court, 25 October 2005, http://www.smh.com.au/news/national/former-leaders-call-for-debate/2005/10/24/1130006061370.html
- "I condemn theFederal Government's counter-terrorism laws. The legislation is more extensive than in Britain, Canada or the United States. The public has been lulled into the false belief that the new laws will not affect innocent, law-abiding citizens" – **A.C.T. Chief Justice Terence Higgins**, ABC News, 14 October 2005, http://www.abc.net.au/news/newsitems/200510/s1482666.htm

- **two former Prime Ministers**:
  - "Gough Whitlam, the former prime minister, has attacked the proposed anti-terrorism laws which would allow Australians to be "interned", and then face criminal charges if they spoke to their families or employers about it" – **Gough Whitlam**, The Sydney Morning Herald, 25 October 2005, http://www.smh.com.au/news/national/whitlam-laments-labor-silence-on-new-laws/2005/10/24/1130006061400.html
  - "These new proposals should be opposed. No strong case has been made that these breaches in the Rule of Law will be effective in the fight against terrorism. ... The laws should be opposed on the basis of substance. The powersare arbitrary altering the quality of ASIO and of the police in significant ways. There are no real safe guards, there is no adequate judicial review. The laws should be opposed because the process itself is seriously flawed" – **Malcolm Fraser**, The Sydney Morning Herald, 20 October 2005, http://www.smh.com.au/text/articles/2005/10/19/1129401313470.html
- **other commentators**:
  - "The Government still has not put on the table why new powers outside the ordinary criminal processes are necessary in the fight against terrorism"– **Hugh White**, former Deputy Secretary of the Department of Defence, Professor of Strategic Studies, Australian National University, http://www.smh.com.au/text/articles/2005/11/08/1131407632703.html
  - "The heightened atmosphere does not alter the argument about the dangers of the Government's anti-terrorism bill, which still needs the closest scrutiny. The Government must explain to Parliament clearly why such an abbreviation of our liberty is necessary" – **The Sydney Morning Herald Editorial**, 9 November 2005

Personal Background

I have been Principal of Xamax Consultancy Pty Ltd, Canberra, since 1982. My company has performed many assignments relatedto eBusiness and privacy, for corporations and government agencies throughout Australia, and in New Zealand, Hong Kong and Canada.

I hold Honours and Masters degrees in Commerce from U.N.S.W., and a doctorate from the A.N.U.

I am, or have been, affiliated with the following organisations, in various capacities:

- Australian Computer Society, as a Member since 1974, Fellow since 1986, Chair of the Economic, Legal & Social Implications Committee 1985-1994, Director, Community Affairs Board, 1989-92
- Australian Privacy Foundation, as a Board-member, 1987-
- Privacy International, as an Advisory Board member, 2001-
- Electronic Frontiers Australia, as a Board-member, 2001-
- University of Hong Kong, as Visiting Professor in eCommerce, 2002-
- University of N.S.W., as Visiting Professor in Cyberspace Law & Policy, 2003-
- Australian National University, as Reader in Information Systems 1984-95, Visiting Fellow 1995-2005, and Visiting Professor in Computer Science 2005-