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

Dear Secretary

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

Free TV Australia (Free TV) thanks the Committee for the opportunity make a submission to the Senate Legal and Constitutional Committee inquiry on the provisions of the Anti-Terrorism Bill (no. 2) 2005. Free TV provides this submission on behalf of all 48 metropolitan and regional commercial television broadcasters.

Free TV acknowledges that the Government is seeking to amend federal laws aiming to improve existing offences and powers targeting terrorist acts and terrorist organisations. We appreciate that the aim of the legislation is to provide law enforcement with increased powers to monitor terrorist activities.

However increasing law enforcement powers should not unduly impact the free flow of information. News gathering and media reporting is essential to open justice, free speech and to public awareness of matters of public importance. The key role played by journalists in that system of open justice and free speech must be recognised and not unnecessarily constrained. Free TV members play an important role in ensuring that the public have access to information on matters of public interest and concern.

Free TV's overriding concern with the legislation is that it goes further than is desirable in relation to the media's activities of news gathering and reporting. While journalists should not be permitted to suppress sources or information that is crucial to the prevention or investigation of terrorist activity, the Bill as currently drafted goes further and in our view, is so broad so as to capture non-terrorism related information and reporting. In this sense, the restrictions within the Bill may well impinge on the implied freedom of political discussion in breach of the Constitution.

This submission is limited to the provisions which have a direct and adverse impact on news gathering and media reporting. In summary, these are:

1. Sedition
2. Detention of Persons
3. Power to obtain documents
4. Disclosure Offences
5. Sunset clause

Sedition

The Bill replaces the current provision in the Crimes Act. However the new provisions would not require proof of intention to incite violence or evidence that actual violence has occurred. This is in contrast to the Crimes Act which requires the prosecution to prove that the seditious conduct was carried out with "the intention of causing violence or creating public disorder or a public disturbance". Replacing "intention" with the notion of "urging" (albeit unintentional or inadvertent) is a significant departure from established principles in this area, bringing with it a very real threat to freedom of publication and broadcast.

Without proof of intention to incite violence or for that matter evidence that violence has actually occurred, the Bill may inadvertently restrict the expression of views through a comment made, a letter or advertisement published, a wire service story or a documentary broadcast. For example a comment that Australia should expect a terrorist attack if the Government continues to support the war in Iraq may be caught by the sedition provisions in the Bill and such a result is, in our view, inconsistent with the implied freedom of discussion concerning political and government matters.

Our concern with the sedition provisions is further exacerbated by the narrow and, in our view, inadequate good faith defence, which is limited to what the broadcaster can show were attempts to point out errors or mistakes in policy, achieving changes to the legal status quo, or matters which are intended to bring about the removal of hostility or good will. The defence as drafted for example would not be available where the material broadcast points out corruption, bias, dishonesty or political partiality on the part of institutions. As these are neither errors nor mistakes the defence would not apply. Free TV is firmly of the view that the defence of good faith should not be limited by listing specific instances when the defence will be available. It is unnecessary, in our view, to narrow the defence at all; the publisher or broadcaster either acts in good faith or it does not.

Detention of Persons

Free TV firmly opposes the broad unrestrained power given to the AFP to detain journalists. While we accept that there may be a need to "preserve evidence of, or relating to, the terrorist act", we are concerned that the legislation does not include the safeguards currently provided for in the ASIO Act.

Under the ASIO Act a warrant can only be issued if a judge is satisfied that the warrant will substantially assist in the collection of important terrorism related intelligence; further a warrant for detention will only be ordered on the basis that if the person is not detained they will warn terrorists, abscond or destroy documents. Also, there is no requirement in the Bill that the person detained have any involvement in terrorism or any link to a terrorist organisation; it is sufficient for the AFP to believe a person to be a witness.

The ability to protect their sources against disclosure is of vital importance to the ability of journalists to gather information of public interest. There is a long history of judicial recognition of the importance of media reporting and journalists' sources. The ability of journalists to assure their sources that confidentiality will be maintained is crucial to our system of open justice and freedom of speech.

Under the proposed Bill, there is a real risk that their capacity to do so will be eroded. This could mean that sources will be less likely to provide information and the free flow of information will be impeded. This will have an adverse and undesirable effect on the media's ability to report on matters of public significance, to scrutinise public affairs and to encourage discussion on matters of public importance. Historically the vital role played by journalists in bringing to light issues of public importance is undisputed. Exposure of the events at Watergate and the weapons of mass

destruction dossier are two examples where protection of journalists' sources was integral to the media's reporting and subsequently the public's awareness of these events. The personal and professional risk to a source of subsequent exposure are so great that even a small erosion of the media's ability to provide protection can have a significant detrimental impact on the number of informants that come forward. The subsequent effect on the free flow of information is undesirable and probably unconstitutional.

The safeguards in the ASIO Bill are vital to reduce unnecessary and unfruitful impositions on journalists and we request that the Bill is amended to include them.

Power to obtain documents

The extension of the AFP's power to obtain documents that may help the investigation of a serious non-terrorist offence is of serious concern to Free TV. Clearly such a provision has no place in Anti-Terrorism legislation. Of similar concern is the AFP's power to require any person to produce documents based on the suspicion that they may assist in the investigation of a terrorist offence.

Unlike the corresponding provision in the ASIO Act where the power of the Director General of Security to seek a warrant requiring a person to produce records or things which are or may be relevant to intelligence that is important in relation to a terrorism offence is subject to qualification, the proposed Bill does not require the notice to produce documents to be approved by any judicial or other supervising body. Of particular concern is the absence of protection on the basis of legal professional privilege or other duty of confidentiality. Free TV seeks the removal of the AFP's power in relation to non-terrorist offences. In relation to terrorist offences Free TV requests that the Bill be amended to require approval of a notice to produce by a judicial or such body. Further, a carve out for documents protected by legal professional privilege or any other duty of confidentiality should be included.

Disclosure Offences

The Bill contains provisions making it a crime to report:

- that a preventative detention order has been made;
- that a person is being detained;
- any information conveyed by the detained person; or
- the existence or nature of a notice to produce information.

While these provisions are similar to their counterparts in the ASIO Bill, the noticeable and critical distinction is that the existing ASIO Act secrecy provisions are subject to the express proviso that they do not apply to the extent that they could infringe the constitutional doctrine of the implied freedom of communication. It is our strong view that by restricting reporting of the detention of persons suspected or committing a crime or who have knowledge of a crime, the proposed provisions are a major inhibitor on the media's ability to report news to the public. Free TV seeks the inclusion of an express provision that the disclosure of documents provisions do not apply to the extent to which they would infringe the constitutional doctrine of implied freedom of communication. (Refer S34VA (12) ASIO Act).

Sunset clause

We believe that the current sunset provision of 10 years is excessive. We are of the view that 3 years as in the ASIO Act is more appropriate and submit that the Bill should be amended accordingly.

Proposed Carve out for Media

Legislation such as the *Trade Practices Act* and the *Privacy Act* contain specific media exemptions. We believe provisions of this kind should be included in the Bill.

Both those Federal acts recognise the vital role played by media in the reporting of matters of interest to the public. It is our submission that the objects of the Bill can be adequately met without expanding the ambit of the Bill beyond that which is necessary. In particular we recommend a media exemption for acts or omissions in the course of publishing or broadcasting (including reporting or publication of news or current affairs, opinion, comment or artistic expression) such that conduct in the ordinary course of broadcasting/publishing is not a capable of evidencing a seditious intent for the purposes of the Bill.

We understand that the sedition offences in the draft Bill will be the subject of further review. Free TV welcomes the review of the sedition offences and would appreciate the opportunity to discuss the Government's intention in this area.

We would be happy to discuss this submission further with you. Please contact Alina Bain on (02) 8968 7100 if you would like to do so.

Yours sincerely

A handwritten signature in black ink, reading 'Julie Flynn', with a long horizontal flourish extending to the right.

JULIE FLYNN
Chief Executive Officer