Introduction

I am a Professor of Transport with qualifications in Physics and Organisational Psychology who, as as a result of some of my transport and IT specialities, has had a close involvement in data, video and other forms of surveillance involved in transport and movement, including pedestrians, machine intelligence tools, RFID, Image processing, electronic tolling and other forms of technology assisted tracking surveillance and identification, and have published in these areas and the interactions with their use for enforcement. I am currently supervising the PhD studies of an ex Chief Constable in Scotland on issues of the interactions between IT and policing

The key aspect of such technologies and one of the two major barriers to their deployment has always been privacy, and concerns over surveillance and addition to surveillance databanks, by the general population: the other has always been equity in impact of such systems when deployed. I have published on the privacy and individual and public response issues in the scientific literature as well as for the Kennedy School of Government.

I have spent significant amounts of time and effort investigating and making evident the more general issues of privacy, surveillance, and imbalances of information power between individuals and government. As a result I have contributed to the Australia Card debates, the consultation process on the border crossing aspects of the biometric Passport and the consequences of the uses of such technologies in domains outside border crossing, where the potential risks to individuals could far exceed the risks to the community of the small reductions in border crossing failures, and the recording of false identity positives will have (and is already having) massive effects on the individuals so misidentified.

Each of these backgrounds and areas of experience bring me to a deep unease over two aspects of this Second Terror Bill

Concerns

These are of two distinct types

1. Governance processes involved

2. The contents of the Bill itself

I will address each separately

1 Governance issues

The Westminster tradition of democracy requires accountability in return for an otherwise free run between elections. This is a fundamental and critical element in maintaining trust and balance between the Executive and the Government and the community, and ensures that the Executive is controlled firmly by Ministers as their posts depend on their departments not acting in a manner that will not force a resignation.

This becomes crucial in a common law country that has no Bill of Rights and a weak Constitution (as is true for Australia), and the potential fragility of

Government credibility is at substantial risk if the code of ministerial responsibility is not firmly exercised.

Community trust in its own institutions is so important that any more than rare and isolated incidents where the Ministerial responsibility code is flouted can materially diminish not just the credibility of the Government of the day - but far more important - the credibility of politicians and the system of government itself.

It would be very difficult for the present Government not to agree that the code on Ministrial conduct in this sense has fallen into near-total disrepair, nor for it to be able to deny that trust in politicians and the underlying system of government has not been materially diminished over recent years. The poor handling of the many equity issues involved in some of the more salient events has also demonstrably undermined community social capital.

Under this current less than transparent or accountable context, the processes of proper governance take on an amplified and critical importance.

Straightforward failures in proper governance and process are legion in the case of the (series of)Terror Bills. The secrecy surrounding the drafts, the disturbingly abbreviated period for inquiry and community discussion of such important and powerful enhancements of executive powers over citizens, and the already-published refusal to even consider the resurrection of the medieval Sedition provisions until after the Act has been passed demonstrate conclusively that proper governance is not being allowed to occur.

One must concede that similar obvious- almost blatant- failures in proper governance and process are equally apparent in the Industrial relations area, which simply underlines the deeply troubling context within which these so obviously hastily cobbled together Terror Bill provisions have been handled.

In this section one simply has to register that the major risk in this series of governance failures is to destroy the very trust required for such extensive and fundamental changes in the relationship between Government and citizens to be accepted.

The extremely high standards of governance, process and drafting required in such cases has all too evidently been neglected, and the Senate must call for a vastly better drafted, and far more widely consulted process to be put in place before a precipitate passing of a deelpy flawed and inadequately tested Bill.

The community trust reserves required to work through the inevitable failures in detail of such a far reaching, yet poorly drafted, Bill are now drawing on severely depleted social capital. The standards to which such huge changes in the fundamental relationship between Government the executive and citizens can be carried through into law must be the highest possible.

This has demonstrably not been the case to date, and had Mr Stanhope not had the clear minded responsibility to share these developments with the community to whom he is accountable (as is the Federal Government and all the other States and Territories) then this Senate Inquiry would probabaly not have occurred at all.

the pool of social and political capital is not inexhaustable, and should not be squandered by poorly drafted and inadequately consulted and discussed legislation of this level of importance.

2. Content issues

This I will address in two different contexts

1. The nature of the provisions and their implications

2. Recommendations

2.1 The nature of the provisions and their implications

• The effect of this Bill is to delete not only habeus corpus (long gone under the previous terror act) but also mens rea. There is no need to demonstrate intent, only circumstantial evidence is required.

• The reversal of the onus of proof, a fundamental element of this Bill, simply does not fit in with a Common Law country: it may well fit better with a Napoleonic inquisitorial Code, which we do not have

This imbalance of power between Executive and citizen is a complete abandonment of the basic principles of innocence until proved guilty, and has the far more ominous subtext of a Government happy to sacrafice a few of its citizens on a simple probability of saving many more - this is a function applicable only to a situation of a formally Declared Martial Law, as it completely undermines the basic Common law right to innocence until proved guilty, whereby the basis is that some guilty will go free- but no innocent will be found guilty.

This is tied in with the antique, very poorly defined and problematic sedition concept - and also underpins the enhanced powers of the executive to kill citizens on suspicion and in addition to self defence. The latter is an area where at least one Australian Police Force has a deep seated and severe problem necessitating major reacculturation to stop the use of lethal force so freely. And this before the extended powers and endorsement originally in the Terror Bill.

• The resuscitation of the truly medieval Sedition offence, so reminiscent of Kings with the High (right to kill) and the Low Justice, and abused in times of community fear (such as those of the communism hysteria), often with results regretted in hindsight.

This entire section needs to be simply removed and made the subject of a new Bill if the government is serious about implementing such a chilling impact on nonviolent action, expressions of opinion, and its impacts on teaching, writing, communication need to be very carefully investigated. The continuing operation of Echelon and the powers under the Waldenaur agreement ensure that almost all communications are now electronically monitored- so these sedition powers will potentially affect all forms of private and well as public interchange

This section is particularly disturbing, not only for its actual vague and almost unlimited application (the very limited exemptions and defences are on a reversal of onus of proof basis which will have a wide self censorship impact in teaching, the arts and [small p] political or industrial action) , but also that it is being proposed by a Government with such poor governance behaviours when its own citizens rights are at risk, which the Ministerial responsibility code and the recent Immigration department inquiry exemplifies.

• There are many more detailed points on the poor drafting - at least i hope it is just poor drafting and not intent - but this Senate Inquiry has been called so precipitously and at such short notice that this is all I have been abel to write in the time

Recommendations

• Extension of the public discussion and refinement of the Bill for at least three more months

• Deletion of the entire Sedition section and, if essential after reconsideration of existing powers under Terror Bill #1 etc, as a separate Bill with an extensive public discussion period supported by a detailed White Paper and a reference to the Australian Law Reform Commission,

• Production of a consolidated body of law and explanatory segments that consolidate the full range of Terror Bills and their closely linked programs (Echelon is one, the prospective Medical 'australia card' is another)

• Public seminars to discuss the bases for these sweeping bills, and to ensure that they are refined and really well drafted if found to be a necessary addition to the current body of law

I close on the reaction of an ex East German citizen when shown the previous draft Terror Bill (he has not yet seen the second one, that under consideration here) --- "these powers are STASI: all over again".

How can one make the case any more strongly for extreme care in ensuring high quality of governance, drafting and consultation surrounding this Bill?

Professor Marcus Wigan
Pesonal website http://go.to.mwigan
Eaglemont Victoria