FITZROY LEGAL SERVICE INC.

Submission to the
Senate Legal and Constitutional Committee

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

"First they came for the Communists but I was not a Communist so I did not speak out;

Then they came for the Socialists and the Trade Unionists but I was not one of them, so I did not speak out;

Then they came for the Jews but I was not Jewish so I did not speak out.

And when they came for me, there was no one left to speak out for me."

Martin Niemoller, 1892-1984

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Dear Secretary

Re: *Anti- Terrorism Bill (No.2)* 2005

We thank the Committee for the tiny window of opportunity granted to the people of Australia to comment on the above *Bill*.

Fitzroy Legal Service opposes this *Bill* outright. This *Bill* is the latest in a raft of federal legislation introduced since 2001 conferring on federal security agencies, the Australian Federal Police (AFP) and the Australian Security Intelligence Organisation (ASIO) **unprecedented** powers of surveillance, stop, search, seizure, questioning, detention, and to covertly exercise such powers, in relation to criminal activities that may be politically and/or religiously motivated. A current review of existing powers has not even been completed, and the federal Parliament has now been asked to "urgently" pass additional unprecedented powers.

The Australian community is entitled to hear the full case justifying these measures. The Australian community has a right to hear all the arguments, including evidence, as to the necessity, reasonableness and proportionality of these measures. The federal Government however, has shown no respect for the people's right to be informed and seeks to avoid the transparency, openness and accountability that community engagement requires. Fitzroy Legal Service regards mere exhortations to "trust" and "faith" in the federal Executive as an insufficient, unsophisticated, and insulting basis on which to pursue matters of public policy in a democratic nation.

In the context of related legislation, this *Bill* fundamentally alters the Australian legal landscape, undermines and threatens the Rule of Law, breaches international human rights obligations, creates a (secret) police state, promotes fear and prejudice in the community, silences political dissent, diverts attention away from the social, economic and political injustices that give rise to racial, religious and/or politically motivated violence in the community, is indirectly discriminatory, takes no account of the mental health and other psychological and emotional impacts these laws will have in the community, especially on women and children.

We urge the Committee and each and every Member of Parliament, to take this opportunity to think outside the current frame of fear and party loyalty, and to calmly and comprehensively scrutinise the impact this *Bill* will have on the long term civil, social and political wellbeing of the community.

Although Fitzroy Legal Service opposes the *Bill* in its entirety, we concede the likelihood that the *Bill* will be passed with amendments, which add safeguards to ensure that any violation of human rights committed by federal agencies in the exercise of these powers is mitigated. Although they may significantly improve the *Bill*, they cannot overcome the fundamental defect of this regime: the lack of necessity, reasonableness and proportionality in the circumstances. The Australian Parliament, at the behest of the federal Executive and the AFP, will be deliberately and knowingly in breach of international human rights obligations under several treaties, in passing this *Bill*.

We note that the *Bill* exposes the Australian Government, including the Parliament, to greater international scrutiny as members of the community look to the United Nations human rights treaty bodies to analyse and comment on these measures.

Please contact us if you require further information about this submission. We encourage the public disclosure of the submission and we welcome any opportunity to address the Committee orally should the Inquiry proceed to oral evidence.

Yours sincerely
Fitzroy Legal Service

Per Simone Elias and Meghan Fitzgerald

Encl

Introduction: Back to the Future

27 February 1933 – Germany – Nazis create a crisis to justify conferral of unprecedented emergency powers to Hitler – they set fire to the Reichstag.

We note that since 2001 the current federal Executive, without any effective opposition from "the Opposition" has exploited fear of "the Other" under the guise of "terrorism". We note that "terrorism" is being used to create a sense of siege and crisis in the community. We note that the federal Executive has framed "terrorism" in a paradigm West/Democracy/Christian/Freedom as against Orientalism (Arab,Asian) /Dictatorship/Islam/Oppression and that racism and religious difference is a crucial signifier, in the community, and within in this frame. We note that such comments are particularly powerful following a tragic act of violence against non-combatant civilians (World Trade Centre, Madrid, London, Bali bombings or the embassy bombings) or to justify Australian military action (invasion of Iraq). We note comments since 2001 that seek to dehumanise and differentiate asylum seekers, refugees, Indigenous Australians, Lebanese and Arabic speaking communities and Muslims, in some misguided attempt to ramp up "nationalism", national identity, national values. We note the legislative and administrative history of systemic racism in this country, and particularly since federalism in 1901 (eg, Immigration Restriction Act).

21 March 1933 – Germany - A law was passed that allowed for the arrest of anyone suspected of criticising the government and Nazi Party.

We note with extreme concern the sedition offences and provisions in Schedule 7 of the Anti-Terrorism Bill (No.2) 2005. We note that Schedule 7 is designed to silence political dissent in this country and we oppose the purpose, nature and scope of the provisions in their entirety.

21 March 1933 – Germany – Establishment of special courts, in the style of a military court to try persons charged with political dissent offences. Prosecutions occurred without a jury and without any counsel for the defence.

We note with outrage the complicity of the federal Executive in permitting an Australian citizen, David Hicks, to be tried before a foreign military Commission which does not apply ordinary rules of evidence or procedure. Indeed the U.S. miliary Commission will operate according to procedural and evidentiary rules developed by the U.S executive and military.

We note that unlike the United Kingdom, the federal Executive of Australia has failed to negotiate the extradition of Citizen David Hicks to be tried before an Australian court of law in accordance with the Rule of Law. It does make one question long held understandings about the meaning and the value of citizenship.

23 March 1933 – Germany – "The government will make use of these powers only insofar as they are essential for carrying out vitally necessary measures...The number of cases in which an internal necessity exists for having recourse to such a law is in itself a limited one" - Hitler's speech to the Reichstag regarding the *Enabling Act*.

We note the comments of the federal Government and Opposition that the Anti-Terrorism Bill (No.2) 2005 provides for vitally necessary measures for a limited period of time. We note that an extremely long 10 year sunset period has been agreed.

It is our view that these provisions will remain law for a very long period of time in Australia, and may never be repealed.

Only 84 of 525 members of the Reichstag refused to concede to Hitler the dictatorial power he sought: the Social Democrats. The Nazi Party becomes hugely popular.

We note that both the Coalition Government and the federal Opposition are supportive of the Anti-Terrorism Bill (No. 2) 2005. We note that there are still a few social democrats in the federal Parliament today. We note with disappointment that both major political parties continue to promote and pursue values of coercive and punitive responses to violence and "anti-social" behaviour, rather than a multi-disciplinary problem-solving approach to complex social, political and economic disadvantages and injustices that give rise to disaffection, alienation, frustration in the community. Rather both political parties use this disaffection in the community to promote fear for their own political benefit. We note that creation of fear in the community, followed by legislative response creates a semblance of security and increases popularity. Hitler's popularity was in the vicinity of 90% throughout the 1930's, but does not justify the exclusionary and genocidal policies of his Government.

Again, we caution politicians against engaging in such conduct for short term electoral gain; you are damaging the social fabric and long term wellbeing of our community.

14 July 1933 - Germany – A law is passed requiring Jewish migrants from Poland be stripped of their German citizenship

We note with extreme concern the latest calls from members of the Coalition Government to strip persons convicted of offences under anti-terrorism legislation of their citizenship. We caution Coalition Members of Parliament against following the path taken by Hitler in the 1930's stripping people of citizenship.

21 May 1935 – Jewish people banned from serving in military. Between 1933 and 1938 Jewish people banned from certain professions and occupations.

We note with concern that Australian Defence Industries has obtained exemptions under various state anti-discrimination laws permitting it to discriminate against persons on the basis of their national or ethnic origin. ADI contracts with the United States require that it employ only Australian or US nationals on certain projects.

15 September 1935 – Germany – Introduction of Nuremburg Citizenship and Race Laws which, among other things, stripped persons of Jewish ancestry of their German citizenship and associated political rights.

We repeat the comments regarding citizenship noted above. We note Mr Ruddock's comments of November 10 2005: " It's important to recognise that if people undertake behaviour which is antipathetic and is in conflict with their commitment to Australia, you are entitled to question whether the protection that comes from citizenship is something that they are able to retain and some people are". We note Citizenship Minister, Mr John Cobb has been requested to investigate the matter.

July 1938 – France, Meeting of the League of Nations – None of the 32 countries accepted Jewish people fleeing from the Nazi regime – Nazi propaganda ensures they Jewish people are feared and loathed; they remain the "untouchables".

We note that recent proposals in relation to stripping persons of Australian citizenship (as if it were a Drivers Licence) may leave such persons stateless, as they may not be accepted by any other country, given current international propaganda regarding anti-terrorism, and its popular manifestation as Islamaphobia .

In reminding the Committee of the lessons of history we also acknowledge the dehumanization, suffering, oppression and deaths of other groups of people at the hands of the Nazi regime:

- Roma and Sinta people
- Polish nationals
- Communists
- Political dissidents and protesters
- Homosexuals
- People with Disabilities, including mental illness
- Jehovah's Witnesses
- Women
- African-Germans
- Twins

And all others who have suffered and/or died because they represented difference, otherness and pluralism.

Below we outline only a sample of our concerns regarding this *Bill*.

1. Preventative Detention Orders

We have serious concerns in relation to preventative detention orders as expressed in Schedule 4 of the Bill. Our key concerns are a breach of the human right to be free from arbitrary detention, the right to receive reasons upon which detention is based, the ousting of the role of the judiciary in relation to reasons for the detention, the restrictions on communication between a detainee and others, and we have serious concerns about the provisions for detention of young people. We refer you to Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR) Article 37(b) of the *Convention on the Rights of the Child*, and also Article 2 of the ICCPR.

It is our view that these provisions undermine the rule of law by permitting the administrative issuing of a 24 hour preventative detention order (PDO) (Clause 105.8 and Sub-section 100.1(1)). A PDO may be extended by a magistrate acting in an administrative rather than a judicial capacity (cl 105.18(2)), which undermines the integrity of the judicial office and ousts rules of law, evidence and procedure in making a decision. In issuing and continuing PDOs there is no hearing of the issues at the time the order is imposed. This breaches the letter and spirit of Article 9.2 of the ICCPR. The fact that detainees must wait until the expiry of the order before they can challenge the basis of the order, and the fact that they cannot apply for revocation of the order, also defies Article 9.2 of the ICCPR.

It is a fundamental principle of the Rule of Law that accused persons be given the reasons founding the accusations made against them and be told of the case against them. The Bill does not provide for a detainee to be informed of the reasons for which a PDO (Clause 105.28(2)(a)). Under international law a person is entitled to be brought before a court without delay so that the

court may assess the lawfulness of detention. This is not provided for in the *Bill*. As the case of immigration detention demonstrates, there are significant human rights concerns associated with, not just the length of detention in relation to arbitrariness, but whether detention is necessary and proportionate to meet a rational objective. This becomes impossible if courts are not provided with reasons underpinning the PDO.

We note that the subject of a PDO has only limited rights of communication with the outside world. We note a detainee may contact a lawyer, the ombudsman (clause 105.37 & 105.36 respectively). We note that a detainee may only contact family members and employers to let them know s/he is safe. It remains an absurdity that a detainee is not able to disclose fundamental information about the PDO (clause 105.35(2)).

We note the absurdity of the requirement that the family member so contacted may not disclose to non-family members any details about the communication with the detainee. Fitzroy Legal Service has serious concerns about the impact of these provisions on women and children. We note the fragile psychological and emotional conditions with which women and children may struggle upon learning that a family member has been detained. We note that they will be unable to seek appropriate mental health support in the community as a result of these provisions. If they do, they may be subject to a penalty of up to five years imprisonment.

Incommunicado detention places Australia next to some dictatorships in the world, in which people (dissenters, agitators) have gone missing from the community (many never to be seen again). Incommunicado detention empowers federal police beyond what is reasonable and proportionate in a well functioning democracy. It breaches the Rule of Law by avoiding judicial oversight of the detention and ensuring that any breaches of the law are unable to be communicated and therefore challenged.

Under Article 37(b) of the Convention of the Rights of the Child, the detention of persons 18 and under is to be used as a last resort. We note that for many years the federal executive deliberately violated this obligation in relation to children in immigration detention. We are extremely concerned that young people between 16 and 18 years will be taken into custody upon suspicion and will not be provided with sufficient reasons for the order or subject to judicial control. We note particularly the impact on women in the community that the detention of young people may have. This provision in addition to provisions that restrict communication (noted above) breach in our view the right to be free from arbitrary interference with the family and home. We note that under the ICCPR everyone has the right to be protected against such interference – Article 17.

2. Sedition

The sedition provisions contained in Schedule 7 of the Bill are an affront to Australian democracy and target political dissent against the federal Executive and its administrative decisions and powers.

We note that the provisions in Schedule 7 may offend against the implied constitutional guarantee of freedom of political expression, and although this guarantee operates as a restriction on the legislative power of the Commonwealth, rather than as an individual right (a distinction not well known in the community) it is our view that the High Court may hold them to be invalid.

Fitzroy Legal Service supports the regulation of public expression to protect members of the community against incitement to racial, national or religious hatred and violence. Expressions

aimed at public policy and the decisions, actions, policies and ideology of political parties and participants in the political process are, however, of a different nature. Political dissent should be encouraged and Australia's political process and participants sophisticated enough to engage constructively in political debates.

Fitzroy Legal Service supports John Pilger's (and others') right to state, in an interview on national television, that the unlawful invasion of Iraq by Australia and its continued occupation is a provocative act that gives rise to legitimate resistance and further, that the Australian forces in Iraq are legitimate targets of such resistance, as unlawful occupiers of the land. (ABC Lateline March 2004 and 12 September 2005). We note this is not a popular view amongst the federal Executive and federal Opposition. But this does not make the view any less legitimate than their mainstream perspective.

We note that federal Parliament has eschewed opportunities since the mid-1990s of introducing legislation that would make unlawful incitement to racial and religious hatred. Since the 1990s the community has been calling for religious vilification laws at federal level only to fall on deaf ears. Since 1975 local and international community has called on the federal Parliament to implement criminal laws relating to racial vilification and also remove Australia's reservation to Article 4(a) in the Convention on the Elimination of Racial Discrimination (CERD). This too has fallen on deaf ears. We note that Article 20 of the ICCPR obliges Australia to take measures to prohibit propaganda for war and advocacy of national racial and religious hatred that constitutes incitement to discrimination, hostility and violence. Fitzroy Legal Service does not regard the current provisions as being consistent with Article 20. These provisions are rights inherent that every citizen in this country should be permitted to enjoy. However the legal protection contemplated by the Article is not available to the citizens of this country. We note that these rights are not designed to protect national governments. They are individual human rights designed to nurture harmonious community relations based on respect for the national racial and religious difference.

The federal Executive has corrupted the intention of these international obligations in an effort to protect itself from growing political dissent. We note that throughout the 1990s members of the community have been steadily becoming more and more disaffected with the political process and their engagement in it. This has partly been caused by economic rationalist policies, the flight of banks and social services from the suburbs and rural communities in Australia, liberalizing Australia's economic system to the detriment of ordinary rural and urban workers has resulted in palpable feelings of frustration anxiety depression anger. This is may manifest as criminal offending and related anti-social behaviors including violence. We note too that a more constructive approach to the disaffection and disengagement felt by members of the community is through engagement with the political process. This is fundamental to our democracy. Any provision that criminalizes political dissent may result in significant civil disobedience campaigns.

3. Indirect Discrimination

As with all of the anti-terrorism legislation introduced since 2001 this Bill will have a disproportionate impact upon Muslim communities. Indirect discrimination is proscribed under the *Racial Discrimination Act* 1975 and the ICCPR and the CERD. Notwithstanding that there maybe reasons does a disproportionate impact on a particular communities Indirect discrimination We note that of the banned terrorist organizations all are Islamic organizations and all persons detained under anti-terrorism provisions have been Muslim.

We are particularly concerned about the effects and impacts on women in these communities who are now living in fear and isolation as a result of public displays of hostility and concerns that they are under continual surveillance by authorities. The mental health of women who do not fully comprehend the nuances of the law is a significant concern in the community. Although these laws are laws of general applicability and do not specifically target a specific section of the community, Muslims themselves and non-Muslims in the community interpret the federal executives framing of terrorism to be directed toward Muslims. Islamaphobia is rife in the community on the streets on roads in workplaces and schools. Anti-Muslim sentiment increases following a foreign event. Many Muslims report locking themselves in their homes for two weeks after such an incident in order to protect themselves from acts of violence on the streets directed towards them. Fitzroy Legal Service knows of incidents where Muslims have been run off the road by other road-users, have become seriously mentally ill as a result of perceived anti-Muslim propaganda where women have become highly protective of their children when in public and are highly reluctant to leave them at school in situations where they are bullied physically and verbally to the point of distress. The Australian Government has known of this since 1991 (Report of the Inquiry into Racist Violence, HREOC) and still has been reluctant to implement laws protecting members of this community.

In closing, we note that we remain concerned about provisions dealing with:

- Control Orders
- Prohibited Contact Orders
- Banned Organisations, particularly the issue of retrospectivity of the provisions
- Sunset clause

- but we reiterate that we oppose the *Bill* in its entirety. We note that the most recent arrests made in NSW and Victoria took place without the need for the provisions contained within this *Bill*. We note that people were duly arrested and charged, brought before a Court for an application for bail, as they would be for any criminal offence, in any criminal proceeding. This should be a sufficient basis upon which to withdraw the current *Bill* from Parliament and we urge that this be done.
