

**INQUIRY INTO THE PROVISIONS OF THE ANTI-TERRORISM BILL (No.2)
2005**

SENATE LEGAL AND CONSTITUTIONAL COMMITTEE

AUSTRALIAN BROADCASTING CORPORATION

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Introduction

The Australian Broadcasting Corporation welcomes the opportunity to make a submission in relation to the *Anti-Terrorism Bill (No 2) 2005*.

The ABC is Australia's largest national broadcaster with Charter obligations to provide comprehensive news, current affairs and information services both domestically and internationally.

The ABC affirms the need for effective security measures to protect Australia against the threat of terrorism. However, it is also concerned to ensure that anti-terrorism laws do not go further than is reasonably necessary in limiting freedom of communication and in particular, the media's freedom to inform the public.

Having considered the Bill in detail and obtained written advice from Counsel in relation to the likely impact of aspects of the Bill on the ABC's activities, the principal areas of concern are as follows:

1. The power to detain persons (which would include journalists and other media personnel) pursuant to Preventative Detention Orders (PDOs) to preserve evidence of or relating to a terrorist act [Division 105].
2. Provisions making it a criminal offence to report certain information in relation to PDOs [s.105.41].
3. The power given to the Australian Federal Police to obtain documents that it believes may assist the investigation of a terrorism offence and, in particular, the further power to obtain documents which may assist the investigation of any serious offence [s.3ZQN and s. 3ZQP].
4. Provisions in relation to offences of sedition and unlawful association [Schedule 7].
5. The Sunset provision.

1. Detention

S.105.4(6) of the Bill permits application to be made for a PDO even against persons whom it is not expected will engage in a terrorist act or are in possession of a thing connected with its preparation where a Federal Police Officer or other relevant authority is satisfied that:

- (a) a terrorist act has occurred within the last 28 days; and
- (b) it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act.

This provision is of particular concern because it does not contain the kind of safeguards against detention that are contained in other legislation such as the Australian Security Intelligence Organisation Act 1979 (ASIO Act) requiring a warrant approved by an independent authority.

While it is hoped that the power would not be used in such a way, there is nothing, it would seem, to prevent a journalist or other media personnel (such as producers, researchers, editors, camerapersons and sound recordists) from being detained in order to preserve evidence relating to a terrorist act. It is noted that there need be no direct connection between the subject and those who performed the terrorist act. It would be open, therefore, for a Federal Police Officer, without further authority, to detain media personnel on the basis of a judgement that it is necessary to ensure that a recording or transcript of an interview, for example, is preserved.

Such a power seems unreasonable and unnecessary, particularly given the separate notice to produce provisions proposed in the Bill. It is submitted that, rather than ensuring such evidence is preserved, the fear of possibly being detained is likely to encourage media personnel to divest themselves of such material before any PDO can be made.

As with the notice to produce provisions, it is of concern that no protection is afforded to information or material that may be the subject of legal professional privilege nor journalists' obligations to protect the identity of confidential source.

2. Disclosure

The Bill makes it a criminal offence punishable by 5 years imprisonment to disclose that a PDO has been made or any other information conveyed by the detainee during the period of detention.

While acknowledging the need for authorities not to jeopardise or compromise an investigation by the premature disclosure of information, these provisions represent a severe restriction on the media's ability to report on matters of crime. At the least, it is difficult to see the necessity for reporting the mere fact of a PDO having been made, without disclosure of other information, to be prohibited. The extraordinary nature of the powers to detain persons conferred on relevant authorities by this Bill makes it even more important, it is submitted, that their exercise be subject to as much transparency and scrutiny as is reasonable in the circumstances. The media plays a vital role in this regard.

It is also noted that these provisions (and the Bill as a whole) are not expressed to be subject to the implied freedom of political communication under the Constitution and may well be in breach of that freedom. There is no doubt that they impinge upon the freedom and there is a real question as to whether they are reasonable and appropriately adapted to a legitimate purpose. In this regard, it is noted that the ASIO Act secrecy provisions are expressed not to apply to the extent that they infringe the implied freedom of political discussion (s.34VA(12))

3. Notices to Produce

The Bill adds new provisions to the Crimes Act empowering an authorised Australian Federal Police Officer to require any person to produce documents, on suspicion that they may assist the investigation of a terrorist offence.

Importantly, and of concern to ABC journalists and other personnel, legal professional privilege and the obligation to protect the identity of a confidential source are not recognised as grounds for refusing to produce documents. It is submitted that the right of refusal to produce documents on these grounds ought to be recognised in the Bill.

In addition, the Australian Federal Police can also apply for an order to produce documents which may assist the investigation of a serious (non-terrorist) offence. It is difficult to understand why such a provision in relation to non-terrorist offences should be incorporated into anti-terrorism legislation. It is noted that section 3ZQP sets out the type of material that may be subject to a Notice to Produce under section 3ZQN and 3ZQO and that the Explanatory Memorandum to the Bill confidently asserts that material held by journalists would not be caught by these provisions. However, this seems far from certain. It is quite conceivable that a journalist may come into possession of material that relates, for example, to a person's financial transactions, travel or telephone accounts and communications. If so, they would not, apparently, be immune from a Notice to Produce.

It is also a criminal offence, punishable by imprisonment for 2 years, to disclose the fact that the ABC or one of its personnel has been given a notice to produce. Again, this seems to be an unreasonable and unnecessary restraint on the media's ability to provide news and information in respect of criminal activities and, specifically, terrorism.

4. Sedition

The Bill repeals the existing law of sedition in Australia set out in sections 24A-24F of the Crimes Act 1914. In broad terms, that law makes it an offence to engage in an enterprise with a seditious intention, which includes an intention to bring the Sovereign into hatred and disrepute, excite disaffection towards the government, Constitution or parliament, or promoting feelings of ill-will and hostility among people that endangers peace, order and good government. A person who engages in a seditious enterprise must also have the intention of causing violence or public disorder.

The ABC believes the sedition provisions contained in the bill run counter to principles of an open society that recognises the right of its citizens to engage in political discussion and debate, a right that is now recognised in the Constitution.

The Bill creates a range of offences for which the maximum term of imprisonment is 7 years. Significantly, none of these offences requires proof of an intention to promote feelings of ill-will or hostility to establish sedition intention. It is enough, in some cases, that one commits an act that might promote such feelings if one acted recklessly and that result followed. In addition, a requirement that there be not only proof of incitement to violence but actual violence or resistance or defiance for the purpose of disturbing the constituted authority is no element of the offence. It is enough that there is an "urging" of another person to act in one of the prohibited ways, even if that act is not intended to be the outcome.

There is no clear definition in the Bill as to what constitutes urging. Whether statements or opinions amount to "urging" is extremely difficult to determine and will depend on a number of complex and inter-related factors, including tone, context, prominence and the identity of the person making the statement or offering the opinion. There is a real risk, however, that much of what is now considered to be legitimate discussion and debate could be caught by these provisions, particularly as it seems the Bill is intended to extend to cover indirect urging as well as condoning, justifying or glorifying terrorism and related activities.

The risk extends to the media, in that publishing or republishing the seditious statements and opinions of others could be construed as endorsing those remarks and thereby amount to urging. Further, debate and discussion about what might be considered to be the seditious remarks of others could expose the publisher to prosecution.

The very real concern is that the uncertainty as to what constitutes urging means that legitimate discussion and debate in the media about terrorism and related issues is likely to be stifled as no media organisation or personnel could, at the risk of imprisonment for 7 years, confidently predict what would pass the test and would, therefore, err on the side of extreme caution.

It is noted that the Bill provides a defence in s. 80.3 for acts done in good faith. However, it is limited to attempts to point out errors or mistakes in policy, achieving lawful change to the legal status quo or matters intending to create ill will or hostility. It is submitted, however, that this defence would have limited operation to media publication of seditious remarks. Again, it places the publisher in the invidious position of having to make judgments about the true nature of those remarks. In our view, the Bill should expressly provide that it is not intended to prevent media reporting in good faith. It is noted, for example, that Commonwealth and state vilification laws contain such a defence.

The ABC is also concerned that while the Attorney-General's consent is required to commence a prosecution for sedition (s.80.5), a person may nevertheless be arrested, charged and held in custody for an indeterminate time in the absence of such consent (subject to proceedings being continued within a reasonable time). There is, it is submitted, an unacceptable risk that journalists and other media personnel charged with a sedition offence could be taken into custody and held indefinitely.

5. Sunset Clause

The proposed legislation introduces extraordinary measures that severely curtail freedom of expression. While the contemporary reality may be that such measures are necessary, it is submitted that the sunset provision of 10 years is excessive. It is suggested that a 3-year period, consistent with the amendments to ASIO legislation in 2003, is more appropriate.

Proposals

The ABC suggests that:

1. The Bill include a media-specific defence to sedition offences in respect of a report or publication of news, current affairs, information, opinion or artistic expression.
2. The Bill incorporate a limited form of privilege for journalists' confidential communications. The ABC was a party to recent joint media submission to the Australian Law Reform Commission on the issue of protection of journalists' confidential sources.
3. The Bill's sunset provision be amended to a 3-year period.