SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL COMMITTEE REGARDING THE INQUIRY INTO THE PROVISIONS OF THE ANTI-TERRORISM BILL (No 2) 2005

By Mark Kernich

PREAMBLE

This submission is submitted under protest against the short period of time between the public release of the Bill and the closing date for submissions. There was not even an intervening weekend. I, along with (I imagine) many other contributors to your committee, have thus had to fit in our reading and consideration of the extensive provisions to what free time was available during a regular working week. This is disgraceful, both in the lack of respect it shows to us, our opinions and the subject matter of the Bill itself. Furthermore, had more time been available, I have little doubt that my thoughts would have found their way into a document approved and submitted by an eminent legal body, thereby gaining both the authority of that body's reputation as well as the drafting and research skills of others within that organisation. With the few days available, that was not possible to organise. Thus, the following views are those of myself alone.

THIS SUBMISSION

Due to the limitations described above, I have not been able to examine and consider to the extent I believe necessary all the proposed provisions, let alone their possible effects. Thus, only certain of them are covered in this submission, and these are not even necessarily those I consider to be the most important (although I have attempted to cover the most important issues, as I see them, of those aspects I do cover).

I would be please to speak further to points raised, or to submit further written material (subject to sufficient notice being given).

SUMMARY OF SUBMISSION

The proposed provisions fail to set up a meaningful review mechanism. They threaten fundamental aspects of Australia's democratic society, challenging our innately held sense of the freedoms of speech, association, communication and travel. They subvert due processes of natural justice and the mechanisms of law designed to ensure fairness in criminal proceedings. They criminalise behaviour and association in a manner that can be abused by the executive in future. They further advance this country along the path towards becoming a police state, the antithesis of what they are supposedly designed to defend (a democratic civil society).

REVIEW MECHANISM – Clause 4

There is no requirement for the COAG to give a report to the Attorney General. This is the condition precedent to such a report being tabled in parliament, and any subsequent parliamentary action based upon such a report. This makes any following review, essentially, an optional extra to be determined, not by parliament, but COAG.

TERRORIST ORGANISATIONS – Schedule 1

Inserted Definition of "advocates" and expansion of ss 102.1 (2) of the *Criminal Code*

The proposed definition sets the basis for criminalising participating in an organisation that INDIRECTLY counsels or urges the doing of a terrorist act, provides instruction on the doing of a terrorist act, or directly praises the doing of such an act.

Thus, by reference to principles or alternatives which the organisation itself does not espouse, that organisation criminalizes its membership. To tell 'radicals' to go elsewhere if they want to participate in the proscribed acts, a time honoured way by which organisations encourage such people to leave, becomes criminal. Similarly, to recognise the planning, skill, forethought and even bravery of those who commit terrorist acts may be taken to be "praising" the doing of these acts, thus criminalising the organisation.

If one is to combat terrorism, it must be possible to recognise the nature of the enemy. If that enemy is brave and resourceful, to not be able to express these facts for fear of prosecution is to hamstring civil society's discourse and debate, ultimately silencing those who might most wish to engage with the enemy in a meaningful way.

The Bill will silence the organisations of civil society closest to, but also opposed to, those who would commit terrorist acts. It is a bad extension of the present proscribed activities attributable to organisations as a way of criminalising their members.

More generally, by muzzling those who advocate terrorist action or praise it (we must remember, with the broad definition of 'terrorism' this conceivably includes such groups as consumer rights, environmental, human rights advocates) we close down one of civil society's greatest protections against corruption of its freedoms, the exposure and debate that is brought about by freedoms of speech and thought. If we do this, we leave ourselves with no protection except the strong arm of the state. History shows, without tight controls, such states becomes totalitarian over time as they find they must continually expand their surveillance and coercive powers.

CONTROL ORDERS – Schedule 4

These provisions effectively criminalise individuals based upon the 'consideration' or 'suspicion' of police officers. Those so criminalised are taken to NOT have committed a crime, but to have merely excited the 'consideration' or 'suspicion' of the officer.

Rights to travel, residence, privacy, association, communication, access to information, ownership, employment and occupation are all subject to controls and prohibition. Under present law, even someone charge with serious criminal offences, if granted bail, has more rights in respect of these things than the uncharged person under a Control Order.

An accused person subject to a bail agreement has implied rights of a fair hearing, the opportunity to face the evidence against them, and that such a hearing will occur within a reasonable time. There is no such 'closure' nor time limit available to those under a Control Order (where rights to know the facts upon which the officer's consideration or suspicion are severely limited (eg ss 104.12 (2) and analogous provisions)).
There is no right to the legal representative of one's choice, it being subject to the control order itself.

There is no right for one's legal counsel to know the substance of alleged fact upon which the Order is based, even if this would not prejudice national security (eg. ss 104.13 (1) (b) and (2) (b)).

Despite the unprecedented controls and effectively indefinite periods to which people can be subject to the provisions, a court need only find the officer's suspicions or considerations to be proven on the balance of probability. This is a low onus of proof, especially when considering the fact that the initial decision is made *ex parte*, and that the limitations (see above) upon an accused's ability to resist an Interim Order being confirmed are so significant.

There is no onus of proof required to be met for an Urgent Interim Order to be recognised as urgent (eg. ss 104.7 (2)), allowing a court's 'satisfaction' to be the measure by which such an Order is granted. This is vague, but partly covered by the time limit then imposed upon the authority to gain the Attorney Gerneral's consent (if only the major provisions that then take effect had sufficient safeguards – which they do not).

There is no requirement upon authorities to ensure a person understands the impact of a Control Order or the procedures available to them and the authority in relation to it (eg. ss 104.12 (4)). Considering the criminal charges that may be laid in respect of breaches of these orders, this is a glaring deficiency. There should at least be a requirement for reasonable attempts to be made to ensure such understanding.

Should The AFP Commissioner attempt to add further restrictions and obligations to an extant Control Order (ss 104.23) there is no requirement to make available even the summary of reasons required for previous applications in relation to the Control Order. This appears to create the opportunity for what few safeguards there are on interim and confirmed orders to be sidestepped should the Order be expanded in its terms. A field ripe for abuse.

PREVENTATIVE DETENTION ORDERS – Schedule 4

There are many things that can be said here, sadly I don't have time to do so. Except to say that the term itself is one which IS definitely associated in history with Fascist police states, that they provide for police cells to act as holding tanks for those subject to other 'warrants' (eg ASIO interrogation warrants) and thus extend the actual time of detention a person is subject to being held in custody while subject to interrogation (the provisions allowing for interlocking periods under detention orders and ASIO warrants).

Again, the repugnant principle upon which these orders are made is that the state can imprison people against whom no charge is laid and no crime alleged. Surely in a democratic society with the supposed rule of law, we can do better than this.

Furthermore, the harshness of the penalties for disclosure of such imprisonment, are such that only major crimes (after conviction before a jury) would receive something analogous in terms of years. And, being a "terrorist offence", such crimes will attract the opprobrium and restrictions of all such offences, both procedurally as well as publically.

TREASON AND SEDITION – Schedule 7

The 'Good Faith' defence for treasonous activity is proposed to be repealed. This will restrict public discussion upon this most serious matter. The effect will be counterproductive.

The old Sedition provisions are to be repealed. There doesn't appear to be any adequate reason for this. They are hardly used anyway, general (non-political) crimes generally being sufficient.

The new sedition provisions make it a crime to "urge" various things. This vastly broadens the scope of communication and activity potentially criminalised.

The 'good faith' defences of ss 80.3 are limited to very specific manners of discourse. For effect, these modes of expression are not necessarily those used by people in modern day Australia. They don't take account of the needs of comedy (eg. satire) or vigorous public debate (the best kind), nor do they make specific allowance for the particular needs of the artistic and news reporting communities. The potential for public knowledge and debate to be stifled is huge. This would be a very bad thing for our society.

These provisions appear broad, draconian and don't take account of the realities of political discourse and invective. Although such discourse is at times distasteful and upsetting, to criminalise presently legal behaviours in chasing the chimera of 'the terrorist' is perhaps to actually create 'terrorists' by jailing our 'intellectuals'. This is no answer to the problems the Bill purports to address.

The present sedition laws came into being after months of vigorous debate and review. The proposed laws have had five days to be examined. They threaten much of what is good in Australian speech, especially the manner of speech of those not well educated. As such, they appear to create a statutory regime that any government which wishes to silence its opposition will be able to use with great joy. This is a very bad thing to leave to future generations.

CONCLUSION

The proposed laws are being rushed through without sufficient time to consider or consult adequately. No pressing case has been made for this urgency. They do not have adequate review mechanisms. They threaten many of our present rights. They allow for future governments to criminalise their opponents for activity that is presently legal. They restrict the rights of accused, lower the onus of proof, impose disproportionate penalties, broaden offence categories to encompass rightfully legitimate activity (and many of the underpinnings of the free and open society we have come to cherish).

They should not be passed in their present form. An adequate mechanism for consideration and review of the passed laws needs to be put in place so that, at a minimum, we know these laws will be properly looked at in future.

Thankyou for your consideration of my submission.

Yours faithfully,

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