Submission to the Senate Legal and Constitutional Committee

Anti-Terrorism Bill (No. 2) 2005

Preliminary note. In view of the very short time frame allowed, I have not been able to determine the ramifications of the Bill. It proposes amendments to 12 acts, some of them themselves very complex, with implications for others. This submission is therefore confined to key issues, and those where I have particular expertise.[1]

Introduction. The Bill is not a balanced piece of legislation.

It is easy to make such a comment, and easy to respond that the bill is balanced. If this part of the discussion is not to merely reflect intuition or subjective assessment, an account is needed of what balancing is.

The noted writers Tom L. Beauchamp and James F. Childres give the following account of what balancing is. They see it as part of the right way to deal with conflicts between basic principles.

i. Better reasons can be given for acting on the overriding norm than on the infringed norm.
ii. The moral objective justifying the infringement must have a realistic prospect of achievement.
iii. The infringement is necessary in that no morally preferable alternative actions can be substituted.
iv. The infringement must be the least possible infringement, commensurate with achieving the primary good of the action.
v. The agent must seek to minimize any negative effects of the infringement.
vi. The agent must act impartially in regard to all affected parties; that is, the agent's decision must not be influenced by morally irrelevant information about any party.[2]

A decision, or a piece of legislation which deals with a conflict of basic principles or rights counts as balanced only if it meets all of these requirements.

These conditions appear obvious and non-controversial. (They bear obvious relation to the traditional discussion of just wars.) Every power granted in the However, serious public discussion of the Bill has been limited to the first and third. Some preliminary discussion is in order.

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[1] One of the ways democracy is better than a would-be benign dictatorship is that the vigorous public discussion of policies produces better policies. The suppression of opposition is thus betrays a lack of commitment to democracy.
[2] Tom L. Beauchamp and James F. Childres, Principles of Biomedical Ethics, Fifth Edition, Oxford University Press 2001

i. I accept that value of the lives of persons is a more important norm than that of liberty. There are however many who have argued that liberty is worth dying for. It has cost many lives to establish and to defend the liberties which this bill seeks to reduce. It is also to be remembered that the liberties and rights which this Bill proposes to reduce are of great importance in protecting a country from tyranny. In that way, they also protect lives. Weakening them threatens to reduce the public apprehension of their importance. Deriding them in political debate is irresponsible.

There is a further the risk that in the hands of a future government or police force, the powers granted in this bill will be used to conceal wrongdoing that is costing lives.

We need to be careful, then, in asserting that the bill is justified, in that lives matter more than liberty.

ii. If the aim of the bill is to prevent terrorist action in Australia, then it is not achievable, and the second condition is not met. More plausibly, the aim is to reduce likelihood of a terrorist attack. It has not been shown that it will do this. Nor is it obvious. The more people that are unjustly confined to their homes, for example, (or the more people who are thought to be unjustly confined to their homes), the more passions will be aroused.

iii. This principle is infringed by many of the powers the legislation would grant. Existing powers can be used to achieve the ends for which it is supposed that this legislation is needed.

iv. The requirement that the legislation involve the least possible infringement of civil rights which is commensurate with its goals being met, is clearly not met.

v. There are other safeguards which should be added, if the bill is to proceed.

vi. I make no comment about this. The principle is mainly intended to exclude self-interested choices. It is a matter for each Senator's conscience as to how they exclude considerations that are morally irrelevant.

If the above brief remarks on principles ii. and iii. are correct, the bill should be rejected. If the conditions are, after all, met, but the comments on principles iv. and v. are correct, the bill should be modified.

What follows are comments, informed by the above considerations, on some of the proposals. Though the over-all argument is that the bill should not proceed, many of the conclusions are dependant on the hypothetical supposition that if might.

1. Review of Anti-Terrorism laws, and the sunset clauses. (Clause 4)
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[3] The definition of 'terrorist act' is 'the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and

So serious are the invasions of rights proposed in this bill, and so dreadful are the consequences of getting it wrong, that it should not be left in doubt as to whether a review will take place. The bill should require it.

Similarly, ten years is far too long for the sunset clauses. Parliament should exercise the supremacy which is its right and duty in a parliamentary democracy, and provide for a review after eighteen months and sunset clauses to repeal the bill after two years.

2. The definition of 'advocates the doing of a terrorist act'. Schedule 1, item 9.

This clause would leave the Liberal Party, the RSL, various right of centre think tanks, and some newspaper groups open to being declared to be terrorist organisations.

It might be argued that this would never happen—that no Attorney-General would propose it, and that if one did, the Governor-General would refuse to sign such a regulation. Such a response would ignore the history of the twentieth century. It is possible to whip up public concern about real and imagined threats, and then persuade them that there are traitors in their midst in the most unlikely places. Think of McCarthy, as well as of Mussolini.

It also misses the point. If even the Liberal Party could be caught by this legislation, it is open to substantial misuse, and more marginal groups will be able to be and are likely to be suppressed.

I do not see how it is possible to amend this section of the legislation without maintaining unreasonable restrictions on free speech and threatening the banning of organisations we should tolerate, unless restrictions are introduced on the definition of 'terrorist action' or exceptions are allowed where defence of the actions is unreasonable. Neither option looks to be workable.

It is tempting to say that we must be able to do something about people who advocate violence. Well, we can and have. There is already a law about inciting violence. Beyond that, the proper response to bad speech is good speech.

This proposal (about praising a terrorist act) is not balanced. It should be omitted.

(c)the action is done or the threat is made with the intention of:
(i)coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or (ii) intimidating the public or a section of the public' and further, (a)causes serious harm that is physical harm to a person; or (b) causes serious damage to property; or (c causes a person's death;
The shock and awe tactics of the Iraq war were explicitly designed to intimidate a section of the public of that country as well as its government. So were the bombing of Hiroshima, Nagasaki and Dresden. The definition of terrorism in the Criminal Code makes no exceptions for justified actions.

3. The notions of 'indirect fostering, planning, assisting and planning' are left undefined. (Item 10.) They should be defined or omitted.

4. Item 16. Too much is left up to the Minister here. Minsters can show bad judgement—and future ministers are an unknown hazard. There needs to be an appeal to a judicial body, with the power to override the Minister's decision.

5. Interim control orders. Schedule 4: proposed division 104.

A. Imminent attack.

Some efforts have been made to reduce the harm of this dreadful provision, in that agreement must be reached between a senior officer of the Federal Police (AFP), the Minister and a court. (I note, though, the opinion of Sir Anthony Mason, that the Attorney-General is not a suitable guardian of individual rights. Repeatedly through this bill, the defence of a person's liberties is left to the Attorney-General.)

I shall, for lack of time, confine my principal comment to the worst restriction on liberty—house arrest.

The bill would allow a person to be confined to specified premises for up to 24 hours a day, for up to 7 days a week, for up to a year. That is, it allows house arrest. It allows it without trial, though with a court hearing. I understand that the decision of the court will not be able to be appealed to higher courts (but that is beyond my expertise). The person (I shall call him/her 'the suspect) may not be informed of the evidence on the basis of which the order is made. They may not even be told the *grounds* on which the order is made. In some cases, even the person's lawyer will not be told, no matter how distinguished and trustworthy the lawyer might be. And the court's decision is to be made on the balance of probabilities.

It is a reasonable supposition that if the provision were used, it would be full-time confinement that would be imposed. It is not easy to see how you would prevent an imminent terrorist action (a real one, not the lesser crimes so called by the Criminal Code) if the person were released for a few hours a day.[4] The point however is that the bill permits it.

This is a very grave reduction in civil liberties indeed—the complete loss of freedom. No trial. No proof beyond reasonable doubt. No real opportunity in some cases for the person to persuade the court about the balance of probabilities. To justify this, it must be proven, beyond reasonable doubt, that the law would prevent acts causing death, and that it would cause less harm than it prevents.

i. Harms it will cause.

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[4] I deal with lesser crimes and acts that are not imminent below.

The law is likely to be counter-productive. It is almost inevitable, first, that the power will be abused. Since the control order can be replaced with another[5], in effect a person can be kept in detention indefinitely.[6] It will also be used, some time where a policeman in certain that a suspect is guilty, and will make up the evidence. [7]

It is also worth noting at this point the opinion of Michael Howard, Leader of the Opposition of the House of Commons, in the just completed debate on extending the time a person may be detained. He referred to experience in Northern Ireland of the complete failure of detention orders to diminish terrorist acts, and their tendency to increase people's sense of grievance. These things fertilise the ground on which terrorists grow.

It is also inevitable that there will be cases where an innocent person is subject to control orders. The point of the standard requirements on a criminal trial is that without them s good number of innocent persons will be convicted. Here, innocent persons stand to be confined to their houses, or, in time, to buildings staffed by police or warders. (How else would you keep real terrorists inside?) Such people will become martyrs.

There is a real risk of death, just as there happens now when people suspected of especially obnoxious crimes are put in jail. A person will be found hung, with the circumstances made to look like suicide. No one will be found responsible. It will turn out that the evidence was inadequate for securing a conviction.

It is probable that the passing of the law will make it easier for other rights reducing legislation to be introduced.

ii. The harm to be prevented.

There are already laws that enable people to be arrested, remanded and then tried if they are planning to commit violent actions. There are laws against incitement, and against conspiracy to commit crimes, including terrorist crimes, murder, and causing harm. These laws can already be used to prevent harm, as is witnessed by the recent arrest of people alleged to have plotted an attack. It must be shown that this law will prevent some *other* harms. To my knowledge, that has not been done publicly.

B. Attacks that are not imminent.

It is reasonably clear that the other provisions (with the exception of preventing a person from leaving Australia to commit an offence overseas) do nothing to prevent an imminent attack. A committed terrorist, especially someone intending suicide bombing, will find a

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[5] See 104.16(2).
[6] This was done in South Africa, with counter-productive consequences.
[7] I recognise that the law already provides for two years' imprisonment for a person who makes false claims in such a case. That won't deter some people—deterrence is not very effective.

way to circumvent orders. (Is it perhaps intended that they will be accompanied at all times by a guard? There is no clause permitting such an order.)

Perhaps the intention then is to discourage susceptible persons from associating with those who encourage terrorist actions.[8] A person will have a curfew imposed, be required to attend counter-indoctrination classes, be isolated from those who are corrupting him or her. The suspect will be treated like a wayward youth.

If that is the case, the bill is poorly expressed. It should be sent back for re-drafting.

Or perhaps the sections are aimed at the indoctrinator. The targeted offence is advocating a terrorist action. In that case, why is there not simply a modification of the penalties available for advocating violence?

C. Urgent control orders.

Given the nature of control orders, this is quite peculiar. With the exception of house arrest and not leaving Australia, the section makes no sense.

D. Lawyer's permission to see documents. Proposed sub-section 104.13(2)(b).

Here and at 104.21(2)(b) this unreasonable restriction is imposed. As a matter of natural justice, a lawyer should have a prima facie right to see every document connected to the case. How else is evidence to be challenged and disproven?

No argument is adduced to support the restriction. There may be cases where it is felt that material is too sensitive to be treated this way. There are already ways for the courts to deal with this.

The bill should not proceed with this unjust and unreasonable denial.

E. 104.29 & 30. Notification of declarations, revocations and variations.

Since the Attorney-General is involved in the process by which applications are made, he/she has an interest in minimising the publicity given to declarations by the court that an order is declared void, revoked or refused. In view of the severe denial of civil liberties this bill would impose, much more is needed by way of monitoring and reporting. A start would be to provide to the Ombudsman a report of every order made and every order refused, as it happens. The role of the Queensland Public Interest Monitor should be replicated in all states and territories as well.

A person holding an office that is independent of government should have access to all documents, and be informed of all impositions of orders, refusals, revocations

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[8] This doesn't fit the wording of the bill at subsection 104.4 © (i)

and declarations that an order is void. Appropriate powers to publicise faults and to seek remedies should be vested in that person.

F. Orders to persons who have received training from a listed terrorist organisation.

A person who has received such training never ceases to have this characteristic. (Logical necessity.) The bill is poorly framed in its dealing with such people. If they are to be treated as automatic suspects, there needs to be some prospect of rehabilitation for them. As it is, even after a life of repentance and good works, they could still be picked upon; and a court with have little option but to impose a control order.

I do not know how to frame the bill in a better form. It would be better for the whole bill to be withdrawn. But **at any rate, this material needs to be withdrawn and re-considered**.

Conclusion concerning control orders. The bill is poorly conceived. It makes severe and dangerous inroads upon civil liberties. It permits imprisonment without trial. It will cause harm. It will be misused. The harm it seeks to prevent can be prevented by more acceptable and less dangerous means. It is not a balanced piece of legislation.

6, Preventative Detention Orders

Many of the points made about control orders, especially those made about house arrest, apply equally here. The measure would be an attack upon civil liberties. It is not likely to prevent crimes where the existing procedures cannot. On the basis of experience in South Africa and in Ireland, it will fail in its purpose. It will be abused. It will encourage harm. It will thus be counter-productive, fertilising the ground for resentment and anger. It is not balanced., it should be withdrawn.

Accordingly, my comments will be limited to some matters of detail.

105.6(1)(b). There is a logical problem about possible future actions, that they cannot be individuated. That is to say, there is no systematic way of determining when one is referring to the same act, and when to two different acts. The sub-section is thus ill-formed, and as in all such cases, will create legal problems.

The limit to 48 hours.

The Government and the Parliament will come under strong pressure to extend the period of permissible detention. There will also be pressure to allow interrogation and the use of information gleaned as evidence in trials. That way lies disaster; as well as abuse of rights and of process. The bill commendably denies such uses.

105.31 Compliance with obligations to inform.

There is a wealth of experience of police using loopholes to avoid giving prisoners and suspects their entitlements. This section is a guarantee that police will lie.

105.32(9). Lawyer's entitlement. As noted above, this is unreasonable, unnecessary and unjust. It should be withdrawn.

105.35 Contacting family members.

It is important that family members should know what has happened to their relatives, and others. This way of doing it virtually says to the relatives 'I have been detained'. It would be better if people could simply say hat they have been detained.

Penalties

To underline the seriousness of the offence, the penalty for giving false or misleading information or for omitting information, both in relation to control orders and in relation to preventative detention should be the same as that for false imprisonment. It is not that the heavier penalty will deter. (Deterrence works no better with police than it does with criminals.) Rather, it should reflect the value of liberty.

105.43(9). The role of parents.

Parents have no right to waive the rights of their children. This position is well established both in morality and in law.[9] The rights of parents are derived from the rights of their children to have their interests protected. Thus no right is given to allow parents to exercise their children's rights in a way that is contrary to those interests. The clause allowing parents to consent to the young person's rights should be withdrawn.

Nor should young people be allowed to waive their rights. The point of denying legal adult status is that they are too inexperienced and too little in control of their emotions to be able to make decisions wisely.

105.51. Legal proceedings.

It is absolutely essential that legal proceedings can be commenced while detention is current. Otherwise, how are abuses to be stopped—especially in the case where a series of trumped up reasons are adduced for repeated bouts of detention?

It is also of importance that an AFP member who is a serious fault in procuring detention order or control order is subject to civil liabilities.

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[9] They have no right, for instance, to volunteer their children for medical experiments where there is any degree of risk; nor to require their child to donate a kidney, even to save the life of a sibling. They are not permitted to waive the child's entitlement to the duty of care owed by a school, on an excursion.

105.53. Sunset clause.

Again the period is far too long, given the gravity of the infringement on civil liberties, and given the consequences of getting it wrong. In addition, the clause is odd. Since detention is only for 48 hours, of what consequence is the ending of the order in ten years' time? Is it intended that the period of detention will be extended?

Sedition.

These clauses are poorly thought out, and criminalise what is legitimate democratic activity.

Bringing the Monarch into contempt.

It might be one's clear duty to demand that the Monarch abdicate, and in order to do that, to expose him/her as having serious moral faults or incompetences. This goes well beyond pointing out faults.

Similarly, the defences at proposed section 80.3 are inadequate. It might be a duty to argue that any of the named office-holders is incompetent, excercises poor or erratic judgement, is stubborn and prejudiced, and so on. One might wish to agitate for the abolition of the Senate. These assertions go well beyond pointing out mistakes.

It is particularly dangerous to exonerate advisors to governors. That would include minsters, who might well from time to time be of poor or incompetent judgement, prone to foster prejudices or to be prejudiced themselves, to act unjustly, to be complicit or careless in permitting or bringing about deaths, and so on.

Rather than continuing the references to such matters, the law on sedition should be repealed.

Schedule 10. ASIO powers.

There are privacy considerations concerning parts of this section, which I do not have the time to pursue. It is clear, though, that no attempt has been made to balance these concerns against those that prompt the proposed changes. At the least, safeguarding clauses need to be introduced.

Item 12. There is absolutely no need for this. Within 28 days, there is plenty of time to ASIO to seek a fresh warrant. The longer period opens up the possibility of harassment. Moreover, frequent seeking of fresh warrants may provide early warning of a need to reform the organisation. The requested extra time should not be granted, here, nor in the subsequent clauses.

Item 16. No reason is given for this other than a liking for symmetry. If this is of interest, it should operate to reduce times, not to increase them.

Further, there is a constant need to the Attorney General, along with the Inspector General and the Leader of the Opposition, to be constantly alert to the possibility of misuse of the powers of the secret services. This is both because of experience overseas (including recent experience in the United States) and earlier experience with ASIO.

Items 31 and 32. If deportation in order to carry out Australia's obligations to foreign countries amounts to extradition without court hearings, this should be rejected.

Over all summary. The bill is full of mistakes, ill-defined terms, misunderstandings, unnecessary and dangerous attacks on fundamental freedoms. Many of its provisions do nor balance the conflicting fundamental principles it deals with. It has been rushed to the Senate. The Senate should exercise tis function, consider it properly and at length, provide adequate time for input, and then, if it cannot be suitably amended, reject it.

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