TERRORISM HAS A NEW FACE
ANTI - TERROR LAWS

(Submission to the Senate Legal and Constitutional Affairs Committee)

INTRODUCTION

The Commonwealth's Anti-Terrorism Bill (No.2) 2005 is a misnomer. It should be called the Terrorism Bill for attacking Australians' fundamental rights and removing vital checks and balances within our legal system. Instead of reducing the threat of terrorism, these laws are likely to inflame racial divisions and cause disaffected individuals to become even more alienated because their rights have been taken from them.

It is easy to get bogged down in the minutiae of alleged safeguards in the Bill, but this is to fall prey to those who believe the Bill is necessary. It isn't. The Australian Federal Police and their State counterparts already have extensive powers with respect to alleged terrorist activity.

Much has been said about 'safeguards' in the Bill. These are supposed to protect the public from undue encroachments on their civil liberties and prevent abuse of these new powers by the police. These attempts to make the Bill more palatable completely miss the point. The powers being given are new and extreme. At best the 'safeguards' only place limits on these powers. The main issue is whether such powers should be given in the first place.

One of the most important safeguards in our legal system is the requirement that police bring charges against a defendant and then present them before a court as soon as possible if the person is being detained. The Anti-Terror laws move us into a whole new realm. The police will able to detain individuals without charging them or bringing them before a court in which the defendant can challenge the evidence against them.

Another major problem with both control and preventative detention orders is that they both rely on the court or issuing authority predicting future events. Is the issuing of the order substantially likely to prevent a terrorist attack? Its hard enough for courts and juries to determine if defendants have committed acts in the past, let alone trying to second guess what they might do in the future. Dressing these laws up in the

reasonable person test doesn't stop it from being a guessing game with people's lives and reputations being on the line.

Terrorism is a concern in Australia, but it should not be exaggerated. The media thrives on it because it provides graphic and chilling consequences. Politicians fall victim to the media hype and believe they must be seen to be doing something. But terrorism is a very small cause of mortality in Australia, and we cause much greater harm to our society by passing laws that have the indicia of tyranny stamped all over them.

CONTROL ORDERS

Control orders place severe restrictions on a person's activities in order to reduce the likelihood of a terrorist attack. It immediately begs the question - why would a terrorist who is willing to risk his own life in order to kill others take any notice. If the evidence is available, surely it is better to charge the individual and then seek to deny them bail if the community's safety is genuinely threatened.

Apart from the efficacy issue there are a number of serious concerns about the introduction of such orders. The police are not required to lay charges and bring the defendant before a court as soon as possible. Interim control orders can be obtained from a court in the absence of the person to whom the order relates. There is no opportunity from the outset to contest the allegations being made. It is quite likely that many of these orders would not succeed if challenged in the first instance. Innocent individuals will be subjected to draconian restrictions and the destruction of their reputation without being able to challenge their accusers until a confirmation hearing is held.

As soon as is practicable and at least 48 hrs before the date for the hearing to confirm the interim control order the person to whom the order relates must be served with a copy of it by the police. The Bill is silent about the time frame between the making of the interim control order and the confirmation hearing. Unless the court ensures a speedy timetable is set for the confirmation hearing, the person to whom the order relates could be waiting weeks or months before being able to challenge the order.

Before a court will issue an interim control order it must be satisfied on the balance of probabilities that the order would substantially assist in preventing a terrorist act or that the person has provided training to or

received training from a listed terrorist organisation. A mere balance of probabilities test is a low benchmark for the price of tyranny. These orders impose draconian restrictions on individuals that haven't been charged with any offence. They can be ordered to stay at certain premises; to wear electronic tracking devices; to refrain from undertaking certain activities; and to report to the authorities as required.

A person's life can be turned upside down on a standard of proof that is more probable than not. A woefully inadequate standard considering the court is attempting to predict the future.

PREVENTATIVE DETENTION ORDERS

Preventative detention orders incarcerate people on the basis of a police officers statement without charges being laid and without a court being involved. The initial preventative detention order is made in the absence of the person accused. He or she has no opportunity to deny the allegations.

A member of the Australian Federal Police (AFP) may apply to a senior member of the AFP for an initial preventative detention order for a maximum period of 24 hours incarceration. At the State levels we don't yet know the period of initial incarceration or the process that the State Police will have to go through. The issuing of either an initial or continuous preventative detention order is not a judicial one. Enormous trust and power is simply being given to the AFP and State police. The staggering conflict of interest involved in having a police officer apply to another police officer has been ignored.

An extension to this initial preventative detention order can be sort again from a Senior AFP member or a continuous preventative detention order applied for from an issuing authority including a judge, federal magistrate or a former judge acting in their personal capacity. If granted the person can be incarcerated for a maximum of another 24 hours. This is not a judicial hearing and even though the issuing authority must consider afresh the merits of the case, there will not be sufficient time to call witnesses or cross-examine the police. To say therefore that sufficient safeguards are in place in relation to protecting the rights of persons affected by these orders is untrue. This will apply to an even greater extent at the State level where individuals can be detained for up to 14 days. Giving individuals the right to appeal to the AAT or Ombudsman during or after incarceration is a form of rectification, not a safeguard.

The Commonwealth has tried to avoid Constitutional invalidity by limiting the time that an individual can be detained to 48 hours. It is a moot point whether these laws breach the separation of powers doctrine because the High Court may still hold that the imposition of such penalties is a judicial act. This doctrine has stood the test of time and is one of the most important checks on Executive power. The Commonwealth has obtained agreement and legislation at the State level to impose 14 days of preventative detention; something it felt it could not get away with.

The restrictions on contact with family and disclosing one's whereabouts are farcical. If the person really is a terrorist then letting them have any contact with a family member, flatmate or work colleague is likely to give the game away. Revealing over the phone or by fax that you are safe but cannot be contacted for the time being will simply become code for being detained by the police. If they are innocent, as many are likely to be, then these restrictions will be a further humiliation.

Those detained under these orders are allowed access to a solicitor, but any contact with the solicitor during the incarceration must be able to be monitored by the police. Solicitor/client confidentiality is clearly breached by such a provision. How can there be effective representations on behalf of a client if the client will say very little to his solicitor because of the presence of the police. Information obtained by the police is not admissible in court, but presumably would be admissible in applications for extensions of the order or applications for a continuous preventative detention order. In this case solicitor/client privilege is clearly breached.

AMENDMENTS TO SEDITION LAWS

Sedition is a very old and outdated law in Australia. It is never used because to do so is politically fraught with embarrassment for the Government. It is by its nature a law that prevents free speech. The offence of Sedition should have been removed from the Statutes long ago. The fact they are still there shows that the State places greater weight on its own preservation than on upholding the rights of individuals to speak their mind.

Being able to speak freely without fear of persecution by the State is in my opinion a fundamental right that belongs to every human being. It transcends the State and is more important than any government.

The amendments contained in this Anti-Terrorism Bill are aimed squarely at further limiting free speech particularly regarding the current government's involvement in the invasion of Iraq. Under section 80.2(7) and (8) of the Criminal Code Act 1995 those who urge a person to assist those at war with the Commonwealth or who urge a person to assist those who are engaged in armed hostilities against the Australian Defence Forces can be charged with Sedition, punishable by 7 years imprisonment.

Those Australians who condemned our involvement in Iraq and have supported/encouraged the Iraqi Resistance to fight against the invaders of their country could now find themselves on the wrong side of the law. My country, right or wrong is not a view I share. If Australia participates in foreign invasions or its military becomes embroiled overseas, it is guaranteed to engender vigorous debate. The morality of such military action will always be vigorously contested. Those who believe that our Government and the Australian military are acting unjustly should be able to urge others to defend themselves, even if that means urging foreign nationals to fight against our own armed forces. Justice and free speech must never be made the casualty of war. It is more important to protect these values than it is to protect our Government or Australia's armed forces.

LACK OF TIME

The Anti-Terrorism Bill (No.2) 2005 is in my view the most draconian unjust piece of legislation to come before the Commonwealth Parliament in my lifetime. It takes away fundamental rights and checks and balances within our legal system and threatens free speech.

The Bill has been rushed into and through the Commonwealth Parliament with little time for review of its provisions either by parliamentarians or the public. It was first tabled in the House of Representatives and became available to the public via the parliamentary website on Thursday 3rd November 2005. The date for the closing of public submissions to the Senate Legal and Constitutional Affairs Committee is Friday 11th November 2005. A mere week in which to review and comment on this Bill. An absolute scandal.

CONCLUSION

The legitimacy of the State depends on the well of support it has from the people. To maintain and add to that well requires great wisdom and justice in the passing of laws. Unjust immoral laws are invariably counter-productive and create more harm than good. Like off-meat they cannot be sanitised.

The risk from terrorism in Australia is small and even if it were greater would not justify this type of legislation. This Bill will only encourage greater alienation and division within our society by depriving individuals of their liberty and free speech without just cause and without appropriate judicial checks and balances.

I urge the Federal Government to withdraw this Bill and if they will not do so the Commonwealth Parliament should reject it.

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11/11/05