NOWAR

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

Dear Committee,

I write to you on behalf of NOWAR SA, a community group which organised the peace rallies in Adelaide before the Iraq war, regarding the government's new proposed anti-terrorist legislation.

We urge you to question the need for new legislation in view of the adequacy of current laws and powers to deal with terrorism and in particular we urge you to insist on the inclusion of strong safeguards to ensure that the new laws, if passed, will not be abused to suppress dissent with government policy, and to ensure that human rights are respected.

The recent arrests in Melbourne and Sydney on terrorism related charges used only existing legislation and do not demonstrate the need for further legislation. The arrests were preventative arrests before the commission of any terrorist act. They show that existing laws are adequate to act well in advance of possible terrorist acts. We argue that the proposed laws in this Bill will be counter-productive in terms of preventing terrorist acts.

The actions of ASIO and the Federal Police have already shown that they are ready to abuse security legislation for political purposes. The most recent blatant example has been the arrest and deportation of American peace activist Scott Parkin. The pursuit of individuals posing no threat to Australian society such as Jack Thomas and Izhar ul-Haque, can also be seen as undertaken for political purposes as the pursuit does not help to prevent any terrorist acts.

Some of the major problems we see with the proposed legislation include:

- wording which allows coercive powers to be used when there is only a possibility of an offence being committed, drastically lowering the threshold for the use of the powers. **There must be clear indication that an offence is liable to be committed before the powers are applied.** This requires change in the wording of the legislation.

- Insufficient judicial oversight of the exercise of the new laws and insufficient independent oversight of the use of security laws by ASIO and the Federal Police. The latter should include independent evaluation of evidence of a threat to security justifying the use of the laws (see recommended safeguard oversight committee on page 4).

CONTROL ORDERS:
It is proposed that Control Orders can be issued by the AFP (through a court) in either of 2 circumstances: 1) if the court is satisfied that on the 'balance of probabilities' the CO would substantially assist in preventing a terrorist act or 2) that the person has trained with a terrorist organisation.
Under this wording 2) may have nothing to do with 1) and people may be subject to Control Orders when in fact they are not a risk to the community. Not everyone who has received training at some point with an organisation now listed as a terrorist organisation can be considered a threat to the community, in fact most cannot. Yet the Attorney General has made it clear that Control Orders will be issued against many of these people as soon as possible. Under these circumstances Australia may soon see peaceful citizens of our country who pose no actual threat subject to highly restrictive and onerous control orders which significantly lower their quality of life. This would not achieve the purpose of the legislation, which is to prevent terrorist acts. **Control Orders should only be issued under the circumstances of 1).** This covers all circumstances in which a person is considered by the court to be an actual terrorist threat. It cannot be assumed, as the legislation appears to do, that everyone who has associated with or 'trained' with a terrorist organisation in the past, is an actual threat to the community.
**Control Orders should be made not on 'balance of probabilities' but on 'beyond reasonable doubt' that 'it would substantially assist in preventing an imminent terrorist act.'**

Judicial oversight of Control Orders: The present legislation provides for executive warrants and very limited right of appeal.
**A full court hearing should hear an application for a Control Order prior to the issue of any Control Order. This should involve both the police or security agency seeking the Control Order and the person who is to be subject to the Control Order if granted. Both parties should have equal access to legal representation and full access to information.**
**Judicial officers should be senior judges of the Federal Court or State Supreme Court. There must also be the right of appeal to a competent Court sitting in review of the first judicial decision.**
**Judicial officers should be empowered to consider the merits of a Control Order as well as the legality of it. They should have access to all the information they need to reach a decision.**

PREVENTATIVE DETENTION:
Judicial oversight is specially important in the case of preventative detention because the subject of detention is not charged with an offence.

Ideally Preventative Detention Orders should be issued after a prior court hearing. If this is impossible due to the perceived urgency of a situation then **a competent court should review each case of preventative detention on its merits as well as legality, as soon as possible after detention has taken place. In the UK review takes place in the first 24 hour period of detention, though not by a court. For a review to be meaningful and independent it must be undertaken by a court and be able to consider the merits of a detention in terms of preventing a terrorist act.**

**Judicial officers should be senior judges of the Federal Court or State Supreme Court.**

The importance of a full court rather than a single judge or magistrate, and the importance of the court in having access to all relevant information is underlined by the following statement by the former Chief Justice of the Family Court, Alastair Nicholson, who said regarding the proposed laws: "*The provision for judicial review is no more than window-dressing. It is a meaningless safeguard because the judge or magistrate concerned has no way of testing what is produced by the authorities. Any judge who has had experience of authorising telephone tapping or the use of listening devices can testify that this is no safeguard and that the judge is little more than a rubber stamp."*

- PROSCRIPTION OF ORGANISATIONS THAT 'ADVOCATE' TERRORISM.
This provision violates the right to freedom of political expression. Proscription of organisations should be limited to those organisations actually carrying out terrorist acts. The proposed new proscription law would be counter-productive and be likely to increase terrorist activity by driving political expression underground. **There should be no proscription of organisations on the basis of expression of beliefs.**

In the UK a similar extension of the proscription regime to include those organizations 'glorifying' terrorism has been amended so that the proposed offence is only committed if the audience would reasonably be expected to infer that the speaker was suggesting that the act of terrorism being glorified should be emulated in existing circumstances.

However this is still open to wide interpretation and may catch a person or organization which expresses support for terrorist acts without directly advocating that others commit a terrorist act. For example a person or organization could express support for the insurgency in Iraq, without advocating the committing of any terrorist act within Australia or overseas. Such expressed support is a legitimate expression of political opinion.

More generally a person or organization could assert the right of the Iraqi people to resist occupation of their country and could conceivably, by implication, be caught under the legislation.
This would be a gross violation of the freedom of political expression.

Because of the difficulties and ambiguity in separating terrorism from legitimate armed conflict it would not be advisable to legislate against the expression of opinion. Legislation should be restricted to the actual commission or planning for specific terrorist acts.
The suppression of the expression of political beliefs increases the likelihood of violent acts in support of those beliefs and is counter-productive. The hallmark of a free society is freedom of expression in terms of public dialogue and this has the effect of greatly lowering the risk of physical violence in society.

If organizations are to be banned on the basis of expressed beliefs this should be **strictly limited to directly advocating the carrying out of specific terrorist acts.**

SEDITION: the restating of sedition offences in the proposed legislation is a cause for great concern because it indicates that this may be used in the current climate to restrict freedom of expression. A recent report on the Federal Government's proposed

terrorism laws, “Laws for Insecurity”, put it this way: *A broadening of the basis for prosecuting political speech as ‘seditious’ is a matter of grave concern in a liberal democracy. Free speech, including speech which is hostile to existing structures and authorities, is part of the right of citizens to engage in political debate.* This political debate must be able to extend to criticism of the government’s foreign policy in Iraq for example, including opposition to the role of Australian troops in Iraq and support for the role of forces fighting against Australian troops.
It is hard to see that the sedition offences are going to contribute to the aim of the proposed legislation to prevent terrorist acts. Rather these are extra provisions that have been tacked on which are more likely to promote terrorism by restricting political expression of beliefs. As such **we believe that the sedition offences are dangerous to our society and should be removed altogether.**

SAFEGUARDS: A PROPOSED OVERSIGHT COMMITTEE

***Incidents such as the recent arrest and deportation of peace activist Scott Parkin have demonstrated the need for independent review of assessments by ASIO that individuals are a “threat to national security.” Under the proposed new laws action can be taken against individuals who are assessed by Australia’s security agencies to pose a terrorist threat. This assessment needs to be checked by an independent body with the power to report to the public whether they agree or not with that assessment.***

***We propose such a committee should be set up. The committee must be truly independent of the executive and must have the power to view all evidence, including secret evidence, and receive all relevant information. Without revealing any classified information the committee must have the power to reveal to the public whether they are unanimous in agreeing with the assessment or not, and if not which committee members disagree. They must also be able to report to the public if they feel information has been withheld from them.***

***Such a committee would enable the public to judge whether ASIO and other agencies are acting within their mandate or acting beyond it, and also would act as a restraint on ASIO and the Federal Police from exceeding their mandate.***

***We suggest a committee of at least 10 people to include the Ombudsman, the Inspector General of Intelligence and Security, the President of the Human Rights and Equal Opportunity Commission and judges who are members of the Federal Court or Supreme Court who are not members of the Federal, State or Territory Magistracy.***
***Such a composition would ensure that the committee could act independently of the executive.***

Additional important Safeguards:

- Include in the legislation wording stipulating that the new powers should only be available as a last resort (as determined by the court) where there is an identifiable and imminent terrorist threat against which other measures would not be effective.

- any warrant, notice to produce or control order should only be issued by a judicial officer, rather than an executive officer.

- **a sunset clause of three years, the laws to be reviewed after 3 years by parliament, not COAG alone. The review process to include input from the community through submissions to a parliamentary Inquiry.**

- A public and independent review of the operation of the new laws by a committee similar to the review committee established to review the Security Legislation Amendment (Terrorism) Act 2002, to be headed by a retired judge and including the Inspector General of Intelligence, the president of the Human Rights and Equal Opportunity Commission and two lawyers nominated by the Law Council of Australia.

Finally, the proposed laws are being rushed through without time for proper community consultation, time to refine the legislation and time to consider whether the laws are in fact needed, considering laws and powers already in place. **We urge you to demand a proper period of consultation with public input extending into the first quarter of next year. We urge you to recommend an extension of this Inquiry into the first quarter of next year.**

We ask you to consider the lack in Australia of legislated protection of basic human rights by comparison with the UK, where similar legislation has been enacted. This means that the possibility for abuse of these laws is greater here. As well there is no evidence that this type of legislation is effective in preventing terrorism, rather it is probably counter-productive and is likely to increase terrorism.

We are being asked to trust this and any future government in the application of these laws. If trust was all that was required there would be no need for the human rights or civil liberties legislation which exists around the world. Former Prime Minister Malcolm Fraser said of the proposed new laws in the Age 20th Oct 05: "*Do we really believe these powers will be effective in the fight against terrorism, or do we believe that the powers themselves are likely to lead to a sense of grievance and of alienation? These are powers whose breadth and arbitrary nature, with lack of judicial oversight, should not exist in any democratic country. If one says that they will not be abused, I do not agree. If arbitrary power exists it will be abused."*

We ask that you do your best to ensure that in seeking to protect ourselves from terrorism we do not inflict upon ourselves the damage to our free society that we wish to guard against. It has been the experience within democratic societies that, once surrendered, the civil liberties and freedoms painfully won over long periods of struggle are not returned by governments. We implore you to protect those freedoms.

Colin Mitchell (on behalf of the NOWAR committee)
Brighton SA