SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE ON *THE ANTI-TERRORISM BILL (NO 2) 2005*

Political Communication, Freedom of Expression and Democracy

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Since the events of 11 September 2001, the federal government has introduced an impressive range of anti-terrorism measures. In numerous ways these developments have altered long-held relationships between the arms of government, undermined civil and legal rights and protections and in doing so have raised fundamental questions about the continued viability of the democratic state.[i]

The Attorney General Philip Ruddock some time ago noted that the events of 11 September 2001 and the subsequent 'war on terror' have catapulted counter-terrorism into the limelight as the policy field of the moment; 'counter terrorism issues have moved to the centre stage of public and political debate'.[ii] However, the acknowledged significance of the contemporary security field, underscored by the passage of some twenty eight security-related Acts in recent years, has not been matched by extensive ongoing public or political debate of their democratic implications. In Greg Carne's view, 'It was as if the threat of terrorism demanded a suspension of democratic critique from proposals constituting an unprecedented increase in executive power'.[iii] This 'suspension of democratic critique' is, in part, a product of the predominance of legal analysis in this field.

I have argued elsewhere that; 'What little scrutiny there has been has come largely from within the law. Sustained analysis of these developments at the level both of public policy effects and broader transformation of the democratic state has been absent'.[iv]

The difficulty created by the overwhelming focus on matters of human rights jurisprudence, is that it risks obscuring the fundamental damage done to the very structures and conventions that characterise democracy. Legislative encroachments on democratic rights and protections are argued not in terms of the political impact of these on healthy democratic practice but rather in terms of the legal impact on international instruments -which in the absence of an Australian Bill of Rights have little or no binding effect on Australian decisions. Executive detention (including of children) without charge and in the absence of suspicion, without independent legal advice and incommunicado, with the threat of 5 years imprisonment for even revealing the fact of this treatment, can never be compatible with any contemporary notion of democratic state, no matter how neatly its derogations can be squeezed into a putative human rights regime. Adhering to the principles of international human rights law ought to be seen as the essential core of

any democracy, not as a divisible or optional component, able to be traded for national security.

Given the short time-frame and extensive legal consideration already given to the preventative detention and control order provisions, this submission will focus on those provisions of the Bill that impact most clearly on key democratic features of political communication and freedom of expression, the proposed sedition offences contained in Schedule 7 of the Bill.

OVERVIEW

On 3 November 2005 the *Anti-Terrorism Bill (No 2) 2005* was introduced into the federal Parliament. The Bill is the latest in a long line of extensive innovations in the Australian criminal justice system intended to counter terrorism. The Bill would enable the detention of Australians without charge, trial or conviction, through the use of 'control orders' and 'preventative detention'; extend AFP powers to stop, question and search suspect individuals; the creation of new crimes of 'sedition'; and an extension of the basis for ministerial proscription of organizations as 'terrorist' organisations to include those 'advocating' terrorism.

In these provisions and the concerns they have engendered, the Bill mirrors aspects of the earlier legislative measures in which, I have noted, the central perception expressed

> *is that issues of national security should not be dealt with by the courts, that it is for the executive not the judicial sphere, to determine what the interests of national security require. This is a critical issue in any attempt to reconcile national security needs with democratic principles. It gets to the very heart of the concept of the rule of law, itself a fundamental tenet of liberal democratic practice and a protection from the arbitrary use of the state's coercive powers; that no individual, no organisation, should be beyond the reach of the law and conversely that all citizens have the right to its protections, equally, as a consequence of judicial determination through the courts*.[v]

The *Anti-Terrorism Bill (No 2) 2005* has had an unusual yet instructive trajectory. Its provisions, many of which required coincident State legislation, were first mooted in the Prime Minister's press release of 8 September in which most, but not all, of these key proposals were noted.[vi] The Council of Australian Governments (COAG) meeting of 27 September 2005 agreed in principle to the federal government's draft legislation. The meeting had been provided with a secret briefing on terrorism by security agencies and the draft legislation was provided 'in confidence' to the State Premiers and Territory Chief Ministers.

Following indications that the government would attempt to rush the Bill into and out of the federal Parliament in a single week, allowing barely one day for a Senate inquiry into its provisions, the ACT Chief Minister John Stanhope released the draft legislation on his web-site, stating that "all Australians should have the opportunity to see, think about and have input into this legislation. The laws are of such significance that every individual

and every organization has the right to have a proper look at the drafts before they are codified into law".[vii]

This draft and the subsequent Bill, have since been the subject of both extensive scrutiny and trenchant criticism. The NSW Council for Civil Liberties, Human Rights Watch, ACT Chief Justice Higgins, Australian Federation of Islamic Councils, the Law Council of Australia, Australian Council for Civil Liberties, John von Doussa QC, President of the Human Rights and Equal Opportunity Commission, Australian Lawyers for Human Rights, and the Law Institute of Victoria have all expressed concern at the draft Bill's 'appalling' provisions.[viii]

The government's desire to minimise public and parliamentary scrutiny of the Bill has been matched by extensive secrecy provisions built into it and which make disclosure of key aspects of its implementation, including the mere fact of detention, a criminal offence. For instance, a parent who tells their spouse that their child is being held in secret preventative detention, commits a criminal offence liable to 5 years imprisonment.[ix]

Despite the reach of the earlier counter-terrorism legislative developments, the government's latest proposals for the first time, take the contemporary security measures clearly away from even contemplated action, moving further into the realm of the control of ideas, of speech, of debate and dissent.

SEDITION

The *Anti-Terrorism Bill (No 2) 2005* proposes a revision and extension of the crime of sedition to now include five new offences including 'urging interference in Parliamentary elections'; 'urging violence within the community'; and 'urging a person to assist, through any means whatsoever, an organization engaged in armed hostilities against the Australian Defence Force'.[x] This latter component in particular has been criticised by artists, lawyers and some government back-benchers as constituting a serious threat to freedom of speech. In particular, the proposed new sedition offences are considered sufficiently broad to capture reflective, journalistic and creative sentiments of writers and other artists and to impose drastic sanctions on the reporting of security issues.[xi]

- **FORCE OR VIOLENCE?**

First, the Bill encompasses persons urging another person to engage in conduct 'by force or violence', a distinction, which is however nowhere specified. The Attorney-General Philip Ruddock, has highlighted the wording of this section of the Bill as reflecting 'community concern about those people whose actions or urgings would encourage others to carry out acts of violence in our community'.[xii] The wording of Schedule 7 however is not so precise. Force is presumably of a lower order than violence and yet what this might cover remains unclear. Would it for instance include non-violent demonstrations against war which are arguably a show of force yet are not violent? Indeed, section 80.2 (7) 'Urging a person to assist the enemy', makes no reference to violence at all. To the contrary, this section covers 'urging a person to engage in conduct … to assist, by any means whatever … an organization or country engaged in armed hostilities against the Australian Defence Force'.

Subsection (2) takes this uncertainty further, suggesting that of relevance to the Court in determining a 'good faith' defence, would include whether the acts were done 'with the intention of causing violence or creating disorder or public disturbance'.[xiii]

- **EVIDENTIAL BURDEN**

As with many of the other most significant counter-terrorism legislative measures, this also places an evidential burden on the defendant. The defendant is required to prove 'good faith' in their conduct, according to a narrow specification which arguably only exacerbates the restrictions on speech this section imposes.

- **NOT TERRORIST OFFENCES**

Finally, it is unclear why these provisions have been included in the *Anti-Terrorism Bill (No 2) 2005*. The new sedition offences are not confined to terrorism offences and have the tendency to label all seditious speech as in some sense inciting terrorism. This is inappropriate both in substance and process, the argued exceptional requirements of dealing with terrorism are being extended to non-terrorist offences, detracting from the reality of terrorist violence and undermining the government's commitment to evidence-based law reform.

DEMOCRACY, DISSENT AND DEBATE

Historically, the crime of sedition, with its focus on words rather than action, has been tainted by an obvious political edge to its use.[xiv] The fact that it can only be proceeded with by the Attorney-General's consent contributes to this perception which, together with the ambiguities of definition and reach, gives rise to the concerns currently expressed that the new offences of sedition may capture artists, journalists and academics whose work does not in any way 'urge' others to violence or force. If, as the Attorney-General insists, these offences are not intended to capture broader satirical, factual and analytical examinations of aspects of war, of disputed government policy and even of objectionable but non-violent political positions, then the Bill should simply be better drafted. As it stands the Bill clearly would enable these essential elements of democratic discourse to be so constrained and criminalized. Knowing that this is possible, regardless of government protestations to the contrary, ensures the 'chilling effect' on expressions of divergent, much less unpopular, political positions. It is this fear of prosecution that leads to the reality of effective persecution, even where charges are not laid. The Bill ought simply to say what its framers claim it says.

A democratic state is underpinned by fundamental principles of the rule of law, responsible government, freedom of political association and expression. These principles cannot be compromised without at the same time also compromising democracy itself. Yet these political and legal innovations in the name of countering terrorism have drastically affected the capacity for citizens to engage in the full and open political communication, debate and ventilation of alternate policy positions essential to democratic participation; 'an informed and engaged public realises the promise of liberal democracy and fulfils its ideal of citizenship'.[xv] Good public policy thrives on debate, encourages difference and welcomes dissent. Insulating the security sector from open debate, critique and alternative approaches, cannot lead to the best policy outcomes whether in terms of combating terrorism or of ensuring the viability of a robust democracy.

Dworkin describes it thus;

> *We guarantee the right to confront one's accusers … not only as an element of human dignity but also because cross-examination exposes lies and forces the government to continue looking until the truly guilty party is found … We protect freedom of speech not only because it allows room for personal self-expression, but also because it promotes the stability that comes from the availability of channels for dissent and peaceful change … surrender of freedom in the name of fighting terror is not only a constitutional tragedy, it is also likely to be ineffective and worse, counterproductive.*[xvi]

RECOMMENDATION

- Withdrawal of the *Anti-Terrorism Bill (No 2) 2005*

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[i] A. Nicholson 'Farewell to freedom' *The Age* 13 October 2005

[ii] The Hon P. Ruddock 'Opening Address' 12th Annual Conference Australian Institute of Professional Intelligence Officers 22 October 2003

[iii] G. Carne, 'Terror and the ambit claim: Security Legislation Amendment (Terrorism) Act 2002 (Cth) (2003) 14*PLR*5 :13-19; :19

[iv] J. Hocking 'Protecting democracy by preserving justice: "Even for the feared and the hated"' *University of New South Wales Law Journal* 27(1) 2004 Thematic Issue: The Legal Response to Terrorism :319-338

[v] See Heinrich's paraphrasing of A.V. Dicey's 3 senses of the rule of law in Heinrich, R. 'The least dangerous profession? Lawyers and the rule of law in the Commonwealth today' Closing Address to the Thirteenth Commonwealth Law Conference. Melbourne. 17 April 2002. Jenny Hocking 'Protecting democracy by preserving justice: "Even for the feared and the hated"' *University of New South Wales Law Journal* 27(1) 2004 Thematic Issue: The Legal Response to Terrorism :319-338

[vi] An excellent comparison of the Prime Minister's press release, the COAG Communique and the draft Bill, can be found in: *Anti-Terrorism Bill 2005: Comparative Table*. Parliament of Australia. Parliamentary Library, Law and Bills Digest Section. 24 October 2005 www.aph.gov.au

[vii] *Canberra Times* 15 October 2005

[viii] '"Appalling" anti-terrorism laws draw criticism' 27 September 2005 *ABC News On-line* http:www.abc.net.au/news/newsitems/20059/s1469669.htm

[ix] *Anti-Terrorism Bill 2005* Schedule 4

[x] *Anti-Terrorism Bill 2005* Schedule 7 Subsection 80.2

[xi] K. Kissane 'He's biting and satirical, but is Leunig also guilty of sedition?' *The Age* 10 November 2005

[xii] The Hon. P. Ruddock 'Sedition: Why the fuss?' *The Age* 14 November 2005

[xiii] Section 80.3 subsection (2)(f)

[xiv] L. Maher 'Why this law is a complete ass' *The Age* 14 November 2005

[xv] I. Marsh 'Opinion formation: Problems and Prospects' in Saunders, P. and Walter, J. (eds) *Ideas and Influence: Social Science and Public Policy in Australia* University of New South Wales Press. Sydney. 2005 :219-238

[xvi] R. Dworkin, 'The real threat to US values' *Guardian Saturday Review* 9 March 2002