AFRICAN THINK TANK COMMENT ON NATIONAL SECURITY LEGISLATION DISCUSSION PAPER ON AUSTRALIA'S ANTI-TERRORISM LEGISLATION

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Preamble

The basis of any free society is a balance between the freedom of the individual and the need of society to restrict that freedom or to monitor the individual so that the safety and freedom of other members of society can be ensured.

Where inadequate checks or restrictions are in place, or where the infrastructure of a society has deteriorated to a point where they have broken down, a state of lawlessness or anarchy prevails which enables the abuse of individuals, particularly women, children, the poor, the sick, and those who are not protected or unable to protect themselves for other reasons.

Where a society takes upon itself too onerous a restriction on the rights of its people, and too intrusive a monitoring of their beliefs, actions, and communications, freedom has also been lost. The government and its organs become in turn, oppressors and abusers.

The basis of the strength of democratic societies is that members have equal access to rights and freedoms. Where a society takes it upon itself to restrict or remove rights and freedoms in respect of a segment of its people, then also that society has also lost democracy and freedom. Rights and freedoms can only be removed or suspended where a person has been shown and proved to have abused them, or in clearly-defined circumstances where the normal infrastructure of society is clearly overloaded or breaking down.

One of the fundamental principles of a free and just society is that no person shall be subjected to arbitrary detention, invasion of privacy, or abuse. Where the society proposes to remove or amend those rights, it must be done in the context of a clear and independently reviewed process. This is the basis on which our freedoms in Australia are founded.

Security review body

One of the most essential safeguards for the freedom of Australians could be secured by the establishment of a permanent independent review body. The members of this could be appointed from respected members of society who were a) independent and b) had the highest level of security clearance – judges and the types of people who are eligible for and considered for or have held gubernatorial positions. As an alternative, a security Ombudsman's office should be established.

This would restore to Australia the right of review which is essential to freedom. Abusers of freedom operate under a cloak of vagueness and secrecy. A review by members of the governing party is no warranty of fair review.

For the sake of brevity, for the rest of this document I shall refer to this review function as the Security Ombudsman.

The right to freedom of communication.

The development of technology has greatly extended the means by which Australians communicate with each other and with people overseas. Written communication was supplemented by telephony, but just in the past fifteen years, this has greatly extended via email, the internet, social networking, sites and services such as Twitter and YouTube, and the evolution of the personal mobile phone into a multimedia and multifunctional personal computing centre.

Technology has also given far greater power, range and depth to those who would monitor such communications. The ability exists now to electronically monitor millions of communications a minute for keywords. However, no computer system yet exists or even can be envisaged that has the capacity to decide whether the use of such keywords is meaningful in the context of national security/

Some provision exists in law to apply for permission to monitor communications, to lawfully do so, and to report on the extent of such monitoring. It seems to be clear that the actual extent of monitoring is far in advance of such reviewable processes. It is also clear that Government wants to greatly extend the area of such monitoring. Security laws also prevent the public from knowing the extent of such monitoring, but it is clear that in the USA, where the amount of monitoring is lower, that there are continuing severe abuses and that the communications of millions of people not suspected of nor engaged in any wrongdoing are intercepted. This is a severe threat to freedom.

Clear laws should be enacted that define under what circumstances Australians may have their communications monitored, in what categories, for how long, and what is to be done in the case of the accidental interception of communications from others. All such monitoring should be reported in detail to the Security Ombudsman.

Search and seizure.

Likewise, it should be clearly established who has the right to search whom and in what context.

At present, under Australian and State laws, a very wide range of officials have the right to enter premises on various pretexts under various laws.

This is open to abuse. For example, Maribyrnong Municipal Council in Melbourne has over the last few months instituted a campaign which is ostensibly intended to find illegal boarding houses. Under this guise, officers from the health and building divisions of council have entered over three hundred properties, that is probably more than 5% of the houses in the municipality. This amounts to an invasion of privacy of over 1200 people, being more than 1.5% of the population of the municipality.

Very often the reason why the properties are suspected as boarding houses is vague. It is clear that many inspections have been prompted by calls from the neighbours, perhaps by people who do not identify themselves, or are instituted for unclear reasons by the inspectors themselves.. The reasons for inspections are not good, the laws cited provide insufficient justification and have been interpreted very loosely, it is plain that unannounced and perhaps even covert visits have been made, many properties have been subjected to multiple visits, and it is overwhelmingly the poor, ill, migrants and international students that have been visited. Yet these two categories of Council officers are just two of more tan a dozen that may enter houses.

A principle must be established that whenever a property is visited by any official for any reason, persons affected must be given notice stating why the property was visited, under what law, by whom, and what the outcome was. Any property seized must be listed and any damage to property. Where no offence is proved, the persons affected must have access to a process of review that is swift, does not require major legal cases and can award them damages in the event that the visit was found to be unjust or in error.

Detention without charge.

The retention and possible expansion of provisions that allow for long periods of detention without charge are of serious concern.

The right not to be compulsorily detained, and to know the charges against a person, is one of the most fundamental and ancient rights in the laws and principles that led to the creation of democratic states. Indeed, the whole basis for differentiation between democratic and undemocratic states is that very right to freedom from arbitrary detention.

The detention of persons under the anti-terrorism legislation has so far followed, and can be expected to follow in the future, an extensive and wide-ranging investigation, often involving hundreds or even thousands of officials, dozens of agencies, the co-operation of several countries, and very far-reaching surveillance both of persons and of their communications, whether electronic or physical. By the time a person is detained, a very large body of evidence occupying months or even years has been amassed. If there is in

all this any firm basis for proceeding against the person, there should be more than sufficient to charge them.

Detention without charge suggests a process of fishing for information or attempting to involve the suspect in self-incrimination. There is cause for a great deal of concern about the conditions under which a person may be detained and interrogated. There have been many recent examples in Australia of detention that is cruel and arduous. Such detention even for seven days can cause substantial psychological harm. Moreover, the process seem to contain insufficient safeguards to ensure that the person's rights are respected.

It has been argued that the rights of society at large and its members permit the violation of the rights of individuals who are detained. Even if this were to be accepted as a valid principle – and there are excellent reasons for never accepting it as a valid principle – in this case we are talking about an individual whose guilt has not been tested nor clearly established by an objective process. Essentially, we are arguing the right to apply stringency against a person where they are innocent in law. There are examples recently where this has been abused and persons subjected to harsh conditions and prolonged interrogation who were later found to be blameless. To accept such processes as an inevitable concomitant to the maintenance of a safe society is a violation of the very principles upon which our liberty as Australians is founded.

Various processes of stringency applied during detention have a poor record of providing useful information. Where they have proved useful at all, it is only where they can be checked against clear external facts. If such facts exist, there should be due cause to charge a person: if not, then persons should not be detained.

It is by no means clear that the safety of Australians is enhanced by permitting the detention of individuals without charge. Even if it were to be accepted, the present legislation is very vague, closed and secretive, open to abuse and has been abused.

Proposed safeguards for persons detained

The detention of individuals without charge even if permitted, needs to be subject to the following safeguards:

1) The person should be clearly informed why they are being detained and a recording kept of that.
2) The maximum period of detention should not be more than 72 hours.
3) The minimum acceptable conditions under which a person is to be kept are to be clearly stated and adherence to them monitored. No person should be interrogated for more than two hours without a half hour break nor should they be interrogated for more than ten hours a day. They should be allowed to sleep or rest in quiet, healthy and dark conditions for at least eight hours a day. No violence, threats against others should be allowed. The person should be allowed at least one visit from someone appointed to help them every 48 hours. They should receive adequate food and drink. They should receive any medicine or medical treatment that they normally take. They should be able to request an

examination by an independent doctor at the start and conclusion of their detention and upon request during it.

4) An independent prisoner's friend or representative should be appointed to ensure that these conditions are not breached.
5) They should have access to a solicitor. If it is felt that they must be detained without such access, their solicitor should be able to observe them, for example through one-way glass.
6) Recordings of all interrogations sessions must be kept so that they can be checked by an appointed independent legal person, such as the Security Ombudsman.

Definitions of terrorism and harm

Any laws that relate to terrorism must clearly define what terrorism is. What constitutes harm must likewise be clearly defined.

Repeal of the National Security Information Act.

There are many flaws in this Act, and it is doubtful whether it should even exist. On the whole, all of the provisions for which the Act was passed seem to be covered by existing laws. The Act goes far beyond what is necessary and ha already seen instances of abuse.

Summary

Vague laws subject to the interpretation of officials are the enemy of freedom. They allow the harassment and persecution of members of society. Australia's record, both recently and in the more distant past, allows us no cause to be sanguine about the possibility of such abuses. Where laws exist that can be abused, they will be abused.

The changes that have been made to Australia's laws under various provisions of legislation that have been introduced under the heading of anti-terrorist measures, are a serious threat to the freedom of Australians. There has been insufficient opportunity given for consultation and discussion. The release of a very lengthy document with only a six-week period for review and comment is clearly insufficient for public review and discussion.

A transparent process is needed, such as a commission of review whose members comprise experts in the law, security, and terrorism, but also leading members of society who can examine the changes that have been made to laws and that are proposed. The members of such a commission need to be empowered to make binding recommendations. Although there have been several inquiries to date, it is clear that the current legislation and the proposed changes to it do not adequately implement their recommendations.

If the government of Australia and its people do not sufficiently safeguard their freedom, this period will see laws put in place that fundamentally break the principles that allow

them to live in a free society. There are already many invasions and erosions of fundamental liberties. This is our opportunity to correct those. If this is not done, and bad and vague laws are enacted, this will be looked upon as a dark period for Australian democracy.

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