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NATIONAL TERTIARY EDUCATION UNION

NATIONAL OFFICE SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL COMMITTEE INQUIRY INTO THE *ANTI- TERRORISM BILL (NO.2) 2005*

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The National Tertiary Education Union (NTEU) represents the professional and industrial interests of over 27,000 academic and general staff employed in Australian higher education institutions. NTEU welcomes the opportunity to provide comment to the Senate Legal and Constitutional Committee Legislation Inquiry into the provisions of the *Anti-Terrorism Bill (no. 2) 2005* (hereafter referred to as the Bill).

Previous anti-terror measures introduced in 2003 and 2004 have already given sweeping powers to the Australian Security Intelligence Organisation (ASIO), as well as fundamentally challenging core legal principles such as the right to remain silent, the presumption of innocence until proven guilty, the right to have access to a legal representative, and the right to appear before a court within a specified time after being detained. The current Bill further amends and, NTEU believes, expands these anti-terrorism laws.

NTEU has two concerns in relation to the current Bill:

- The impact generally in terms of increasing the powers of police and security services at the expense of fundamental human rights, including Australia's international human rights obligation.
- The issues arising out of the legislation that we believe will directly impact on universities, their staff and their students.

The following submission will outline NTEU's concerns in relation to both of these areas, and propose amendments which the Union believes will protect university staff and other professions engaged in good faith bona fide artistic, literary and journalistic endeavours.

1. General human rights concerns in relation to the legislation

NTEU shares many of the concerns about the general human rights implications of the legislation under consideration that have been expressed by legal, ethnic and community groups. The Union believes it is a central fallacy underlying the legislation and much of the debate around it, that we can gain security and, by association, successfully combat terrorism and its causes, by forgoing or overriding human rights considerations.

In terms of its overall implications, a far better balance is needed in the Bill between legitimate measures to deal with the threat posed by terrorism and Australia's human rights obligations. Rather than imposing an arbitrary cut-off date for passage of the legislation, as much time as is necessary to ensure this balance should be allocated to debating the Bill.

These concerns will be dealt with in more detail and with more expertise in other submissions to this inquiry. Many of these are summed up, however, by advice provided to the Australian Capital Territory Chief Minister by three distinguished international human rights experts on an earlier draft of the bill, which remain very relevant¹.

Their advice stated that the laws *"seriously limit a number of fundamental human rights, and are not subject to an effective procedure of judicial review that provides adequate safeguards against violations of the human rights of the persons affected."*

¹ Advice provided to ACT Chief Minister John Stanhope, 18 October 2005

Specific problems they identified with the legislation include:

- That the control order and preventative detention order regimes breach the human rights to be free from arbitrary detention, to a fair trial, to freedom of movement, to privacy and family life, and to the presumption of innocence.
- That the laws in general do not comply with Australia's international obligations, particularly our obligations under the International Covenant on Civil and Political rights, including the right to liberty, the right not to be arbitrarily detained, the right to access a court and fair trial.

The Union also shares the concerns that have been expressed, including by many Coalition backbenchers, in relation to the impact of the Bill's sedition provisions on freedom of expression. NTEU believes that there are strong arguments that Australia does not need anti-sedition laws at all, and that criminalizing expressions of support for terrorism risks forcing such beliefs underground and making them harder to counter.

The legislation's impact on fundamental human rights is made worse by the fact that the crimes set out in the Bill are both very broad but at the same time vaguely defined. This comment is relevant to the definition of 'terrorism' and a 'terrorist organisation', the test for proscription, and many issues concerned with the proposed sedition laws and the 'good faith' defenses available under them. This will enable the legislation, if it is passed in its current form, to cast a very wide net that will have a number of unintended but significant negative consequences for many groups and professions in the community.

NTEU would add that the implications of the anti-terror legislation are made more serious by the absence of a bill of rights. This leaves the Australian Constitution, which mainly protects political communication and not free speech more generally, as the main safeguard. As some commentators have pointed out, this means that Australian courts are less able to supervise sedition laws for excessively restricting freedom of expression.²

The absence of a bill of rights has also hampered the evolution of a sophisticated jurisprudence on the circumstances in which the existing crime of incitement can legitimately be seen to restrict free expression.

NTEU believes that it is therefore important that the Federal Government should give serious consideration to beginning the process of establishing a national bill of rights.

2. Specific impacts for universities

NTEU believes the Bill could have significant impacts on universities, their staff and students. The Union's two key concerns are:

- The serious, albeit largely unintended, consequences that could arise from the fact that the definition of a terrorist organisation has been widened in the Bill to include 'advocating' a terrorist act, which includes praise. This is particularly problematic given that 'praise' is not defined in the Bill.

² *Briefing on Sedition Offences in the Anti-Terrorism Bill 2005*, November 1 2005, Dr Ben Saul, Gilbert and Tobin Centre of Public Law, University of New South Wales

- The potential for academic freedom rights to be caught up in the broader diminution of human rights that will accompany the Bill's anti-sedition provisions.

Particularly at risk are:

- Staff that teach or research in areas such as terrorism or Islamic studies, or who have research interests on or in particular countries where terrorist organisations are known to exist.
- Academic and technical staff that undertake research and teaching in applied sciences, biotechnology, engineering and possibly even nursing and medical-related disciplines.

The threat from the legislation to legitimate activities undertaken at universities is also real given that the theme of "safeguarding Australia" is currently one of the four national research priorities encouraged by the Department of Education Science and Training, and this specifically includes research on terrorism.

NTEU is concerned that the proposed Bill may lead to surveillance of university staff and student's teaching and research, including their use of library and Internet materials and their attendance at seminars and conferences. There is also the risk that university administrators may be required to monitor staff and students on behalf of police and security services.

Already, in late July, Australian Federal Police (AFP) questioned a Monash University student researching Palestinian suicide bombings after he bought and borrowed books on the subject. Exactly how the authorities identified this student is unclear, although it is NTEU's understanding that authorities were alerted to the student's activities by the university's administration.

a) Definition of a terrorist organisation (Schedule 1)

Under the Bill an organisation advocates the doing of a terrorist act if:

- The organisation directly or indirectly counsels or urges the doing of a terrorist act;
- the organisation directly or indirectly provides instruction on the doing of a terrorist act; or
- the organisation directly praises the doing of a terrorist act.

NTEU believes that serious, albeit unintended, consequences could arise from the fact that the definition of a terrorist organisation has been widened in the Bill to include 'advocating' a terrorist act, which includes praise.

To be classified a terrorist organisation, the Federal Government currently must be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur). The Minister will now be able to proscribe an organisation if they are satisfied that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur) or the

organisation advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

It is unclear exactly what it means for an individual or organisation to indirectly provide instruction on the doing of a terrorist act. For example, under the Bill would an academic who unknowingly through their teaching activities provided the knowledge and skills to assist an individual or organisation to carry out or plan a terrorist action be liable to prosecution? This danger is particularly pronounced for academic and technical staff that undertake research and teaching in applied sciences, biotechnology, engineering and possibly even nursing and medical-related disciplines.

NTEU finds the concept of 'praising' a terrorist act also highly problematic, particularly combined with the fact that 'praise' is not defined and that the Bill makes it an offence to 'associate' with a terrorist organisation. For example, what would be the situation of an academic were to describe the tactics of Jamar Islamia in Indonesia and then provide a sociological explanation for why they might feel angry and disaffected enough to become a suicide bomber in a crowded tourist strip in Bali? Is this advocating a terrorist act? Staff and students could further be at risk if they possess things connected with terrorist acts, or collect or copy documents likely to be viewed by authorities as facilitating terrorist acts.

The situation would be even more problematic if the academic or student in question was attached to or had connections to a non-government organisation working in Indonesia, some of whose members may, knowingly or unknowingly on the part of the academic or student, have associations with terrorist organisations or sympathises.

A further complication that arises from these examples concerns the issue of the possible proscribing of an academic if they were to be found guilty in either of the circumstances described above under the Bill. What would be proscribed, the individual, the faculty or department or the university as a whole?

Linked into this is the broader question that while it may be defensible to ban groups which as a whole actively engage in or prepare for terrorism, is it right to ban a group or institution because individuals within it associate with someone who praises terrorism or indirectly provide instruction on the doing of a terrorist act? The Bill fails to answer any of the above questions.

Academic staff could face the possibility of being served control orders that prevent them from undertaking research and/or teaching if they are deemed as facilitating, directly or indirectly, the training of a suspected person.

With the exception of Queensland where a modified regime exists, AFP officers can apply to the court to make an interim control order if a court is satisfied that, on the balance of probabilities, the making of 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 or might have in possession documents that may assist in the investigation of a terrorist act or likely terrorist act.

Further penalties would apply if the subject of a control order discloses his or her situation beyond contacting only a member of family or another person if they live with them but they are not family. Under preventative detention orders', the Bill allows AFP officers to detain a person or persons to prevent an imminent terrorist act or preserve evidence relating to a recent terrorist act.

b) Sedition (schedule 7)

The potential impact of the sedition laws contained in the Bill on freedom of expression generally and academic freedom in particular, including their vaguely defined but broad nature, are a key problem with the Bill.

NTEU notes the Federal Government's argument that this Bill simply codifies anti-sedition offences that have already existed in legislation, without misuse, for over 40 years. The Union agrees, however, that by choosing to update currently existing sedition provisions the Government is breathing new relevancy into what are essentially early 20th century laws out of step with Australia as a modern, tolerant and pluralistic democracy. As Dr Ben Saul, Director of the Bill of Rights Project at the University of New South Wales Gilbert and Tobin Centre for Public Law, puts it: "*Old fashioned security offences are little used because they are widely regarded as discredited in a modern democracy that values free speech. Paradoxically, the danger in modernising these offences is that prosecutors may seek to use them more frequently since they are considered more legitimate.*"³

The concern that by modernizing the laws the Government invests them with renewed legitimacy is backed up by the fact that the sedition offences in the proposed Bill include increased penalties, with the burden of proof being on the part of the defendant.

The Bill repeals existing anti-sedition provisions in the *Commonwealth Criminal Code 1995*, and replaces them with three new offences. The first two involve a person encouraging another to violently overthrow the Constitution or any Australian government or violently interferes with the conduct of federal elections. The third offence is when a person urges a racial, religious, national or political group to use violence against another group.

The new sedition provisions make it an offence if a person urges another person to engage in conduct that assists an organisation or country that is "at war with the Commonwealth, whether or not the existence of the state of war has been declared", or if that conduct assists an organisation or country engaged in armed hostilities against the Australian Defence Force.

Not only are the new offences intended to capture comments against Australian forces an unnecessary extension of criminal liability in light of the wide range of existing security offences which criminalise conduct that is harmful to Australian forces, but they could have unintended consequences in terms of curtailing academic freedom. They could, for example, impact on vocal critics of the Government's war in Iraq.

While the Bill includes a good faith defence protecting free speech that points out mistakes of political leaders, government laws or courts, including lawful attempts to change the law or statements about industrial matters, it is unclear to NTEU exactly to what extent these reduce the danger of being able to criminalize political opponents. As Saul puts it:

"While these defences seem wide, protecting legitimate free expression, most of the defences are directed towards protecting political speech, at the expense of other types of expression. By contrast, good faith defences commonly found in

³ 'Watching What You Say', Ben Saul, *The Age*, October 19, 2005

state and federal anti-vilification legislation typically protects statements made in good faith for an academic, artistic, scientific, religious, journalistic or other public interest purposes. Such statements may not aim to criticize the mistakes of political leaders, the errors of governments or laws, matters causing ill-will between groups, or industrial issues. The range of human expression worthy of legal protection is much wider than these narrowly drawn expressions”⁴

3. Proposed legislation safeguards

As has been stressed previously, NTEU believes that Australia does not need anti-sedition laws at all, and that criminalizing expressions of support for terrorism risks forcing such beliefs underground and making them harder to counter. NTEU would thus urge the Senate to recognise the wide ranging and non-partisan opposition to the anti-sedition provisions and remove them from the Bill.

If the Senate chooses not to take this approach, however, NTEU believes it is important that safeguards are introduced into the legislation to ensure that the Bill does not unintentionally impact on the legitimate activities of academics and other groups in society.

In particular, it is important that changes are made to the good faith defences under the sedition provisions in Schedule 7 of the Bill to safeguard activities undertaken in good faith related to a bona fide artistic or literary endeavours, and bona fide academic and scholarly research in the course of teaching, education and research.

It is also highly desirable that a similar good faith defence be introduced into Schedule 1, concerning definition of a terrorist organisation.

These changes are vital to ensure that university staff, and other groups in society such as artists and journalists, are not prosecuted under the Bill for undertaking activities in good faith as part of their professional responsibilities.

NTEU would advocate that a good model that could easily be applied to the Bill is contained in 18D of the *Racial Discrimination Act 1975*. This section provides a defence for anything said or done reasonably and in good faith:

- a) *in the performance, exhibition or distribution of an artistic work; or*
- b) *in the course of any statement, publication, discussion or debate made or held for any genuine, academic, artistic or scientific purpose or any other genuine purpose in the public interest; or*
- c) *in making or publishing:*
 - i) *a fair and accurate report of any event or matter of public interest; or*
 - ii) *a fair comment or any event or matter of public interest if the comment is an expression of a genuine belief held by the person making comment.*

4. NTEU Recommendations

Recommendation 1

The Senate give consideration to how the Bill can better balance legitimate measures to deal with the threat posed by terrorism with Australia’s international human rights obligations.

⁴ Ibid

Recommendation 2

The Senate reject the anti-sedition provisions of the *Anti-Terrorism Bill (no. 2) 2005*, as out of step with a modern, tolerant and pluralistic democracy, and because criminalizing expressions of support for terrorism risks forcing such beliefs underground, making them harder to counter.

Recommendation 3

The Senate, in the event it chooses to retain the sedition provisions of the *Anti-Terrorism Bill (no. 2) 2005*, introduce safeguards into Schedule 7 of the Bill, to ensure a defence is introduced for good faith activities undertaken in artistic and literary endeavours, and bona fide academic and scholarly research in the course of teaching, education and research. This defence should be modelled on Section 18D of the *Racial Discrimination Act 1975*.

Recommendation 4

The Senate introduce a defence modelled on Section 18D of the *Racial Discrimination Act 1975* into Schedule 1 of the *Anti-Terrorism Bill (no. 2) 2005*, concerning definition of a terrorist organisation.

Recommendation 5

The Senate urge the Federal Government to give serious consideration to beginning the process of establishing a national bill of rights.