



**INQUIRY INTO THE PROVISIONS OF THE  
ANTI-TERRORISM (NO. 2) BILL 2005**

**SENATE LEGAL AND CONSTITUTIONAL COMMITTEE**

**SPECIAL BROADCASTING SERVICE CORPORATION**

**14 November 2005**

SBS appreciates the opportunity to provide comment to the Senate Legal and Constitutional Committee on the Anti-Terrorism (No. 2) Bill 2005.

SBS is conscious of the need for security legislation and appreciates the objective of the proposed legislation to strengthen the monitoring of terrorist activities. However, those aims need to be appropriately balanced against the public interest in the free flow of information on matters of national importance which is fundamental to a free and democratic society. This includes media reporting on current events and their context, including the activities of and beliefs held by Australians.

SBS sets out below its concerns in relation to the following provisions of the legislation:

1. Preventative detention orders and journalists;
2. Power to obtain documents from the media;
3. Reporting on preventative detention orders;
4. Sedition;
5. Sunset provisions.

SBS notes that similar issues affecting the media have been raised by John Fairfax Holdings Limited, News Limited, West Australian Newspapers Limited, the Australian Press Council and AAP (Print Media Submission) and by Free TV Australia.

Context
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The Special Broadcasting Service Corporation (SBS) is established under the *Special Broadcasting Service Act 1991*. Its principal function is to provide multilingual and multicultural radio and television services that inform, educate and entertain all Australians, and, in doing so, reflect Australia's multicultural society.

In doing so, it exposes Australian audiences to a wide range of cultures, values and perspectives through its television, radio and online news and current affairs services, documentary, cultural and other programming including:

- SBS Television: two nightly international *World News* services; *Dateline*, an international current affairs program; *Insight*, a national current affairs program which provides forums for Australians to speak on current political and social issues; *Living Black*, an indigenous current affairs program; as well as international in-language news services on the *WorldWatch* program and the digital *World News Channel*. SBS also broadcasts programs that use satire and comedy to explore contemporary issues (for example *John Safran vs God*, 2004);
- SBS Radio: programs including local, national and international news and current affairs presented from an Australian perspective in 68 languages;
- SBS Online: news and current affairs information including discussion forums for programs such as *Dateline* and *Insight* and audio streaming of SBS Radio.

1. Preventative detention orders and journalists
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SBS is concerned by the current preventative detention orders provisions in Schedule 4 of the Bill, which allow for a person to be detained in order to preserve evidence of or relating to a recent terrorist act. This section should incorporate similar safeguards, checks and balances to those contained in other legislation, such as the

warrant provisions of the *Australian Security Intelligence Organisation Act 1979 (ASIO Act)*.

Without such provisions, the Bill would allow the Australian Federal Police (AFP) to detain people, including journalists, who have no link to 'terrorist' acts.

In contrast, Division 3, Part III of the *ASIO Act* provides that a warrant for the questioning of a person can only be issued if there are reasonable grounds for believing it will substantially assist the collection of important intelligence in relation to a terrorism offence, and that relying on other methods of collecting that intelligence would be ineffective (ss. 34C(3)(a)–(b), 34D(1)). Further, to get authorisation for a person to be taken into custody immediately or brought before a prescribed authority immediately for questioning, there must be reasonable grounds for believing that the person may alert a person involved in a terrorism offence that the offence is being investigated or that they may destroy, damage or alter documents they have been requested to produce or that they may not appear (s. 34C(3)(c)). Similar provisions apply to directions relating to the detention of persons (s. 34F).

SBS submits that it is essential that such safeguards be included in the Bill.

Further, the Bill does not take into account the special role of the media and the professional obligations of journalists, including confidentiality of sources, which has long been recognised. SBS supports the inclusion of appropriate provisions to achieve a balance between the need to obtain information on matters relating to national security and the public benefit in protection of journalistic sources to ensure the continued ability of the media to expose issues of public importance through those sources.

## 2. Power to obtain documents from the media

SBS is similarly concerned with Schedule 6 of the Bill, which vests power in an "authorised AFP officer" to require a person to produce documents that it "considers on reasonable grounds" will assist in the investigation of a "serious terrorist offence." As presently drafted, the provision does not adequately address matters such as the public interest, legal professional privilege and duty of confidence.

In contrast, the *ASIO Act* special powers relating to terrorism offences have safeguards built into them, requiring a warrant before a person can be required to produce documents relating to a terrorism offence and only before a prescribed authority (s. 34D(5)).

SBS strongly supports the inclusion of similar safeguards in the Bill. Any provision relating to the production of documents in relation to terrorist offences should require judicial approval and an exemption for documents protected by legal professional privilege or any other duty of confidentiality.

The Bill also provides that the AFP can apply to a Federal Magistrate for an order to produce documents that will assist in the investigation of a "serious offence", that is, separate to the provisions relating to a "serious terrorist offence". This provision is also a matter of serious concern: it appears to go beyond the objects of the Bill and, its potential impact on the independence of journalists goes well beyond any justifiable public interest.

SBS believes that any AFP powers in relation to non-terrorist offences should be removed from the Bill and are more appropriately dealt with elsewhere.

### 3. Reporting on preventative detention orders

The provisions dealing with reporting on preventative detention orders will also unreasonably affect the media's ability to disseminate news and information relating to terrorist activities and the associated political and government response.

The provisions may also breach the constitutional doctrine of implied freedom of political communication which operates to ensure the effective operation of representative and responsible government by ensuring freedom of communication concerning political or government matters.

The *ASIO Act* takes this into account in its provisions on secrecy relating to warrants and questioning (s. 34VAA(12)). Similar provisions should be included in the Bill.

### 4. Sedition provisions

#### **Generally**

Under the current law a person is guilty of sedition if they engage in a seditious enterprise or publish seditious words with the *intention* of causing *violence, or creating public disorder or a public disturbance* (ss. 24B, 24C *Crimes Act*). The new sedition offences in the Bill (proposed s. 80.2 *Criminal Code*) do not require the element of *intention* and knowledge (the fault element for the current law). Rather, the lower element of recklessness is the new requirement for some of the offences.

The Bill broadens the sedition offences to include: urging violence within the community (s. 80.2(5)), urging a person to assist the enemy (s. 80.2(7)) and urging a person to assist those in armed hostilities (s. 80.2(8)). The concept of "urging" another person to do certain acts is undefined. The vague and broad nature of the offence makes it very difficult to determine where the boundaries may lie for a broadcaster reporting and responding to current events. For instance, one concern would be that if an SBS journalist or broadcaster interviewed a person involved in a conflict, it might be deemed to be "urging another person to assist the enemy".

These concerns, together with the increased penalty of 7 years imprisonment, imposes an unreasonable burden on the media: among other things, a media organisation may be unintentionally or inadvertently liable for reporting on matters of legitimate importance to the public, including, for example, a third party opinion. This would appear to go well beyond what is appropriate and may be inconsistent with the implied constitutional freedom of speech for discussion of political and government matters.

SBS notes and supports the examples given in the Print Media Submission. In addition, it has the following specific concerns in relation to some of its unique broadcasting activities:

- *Insight* is the only public affairs forum program on national television allowing members of the public and specialists to debate matters of national interest.
- SBS Radio's programs in 68 languages are directed to the almost 3 million Australians who speak a language other than English at home. They serve a critical purpose in providing Government and community information and covering issues of concerns to these diverse groups of Australians. Many of these programs have talkback sessions which are a vital point of contact between SBS and these audiences.

- Satirical and comic programming with a political theme may be inhibited from commenting on public affairs.

All SBS broadcasts are covered by SBS' Codes of Practice and Editorial Guidelines which address issues such as balance and fairness in news and current affairs reporting, and sensitivity to issues of religion.

In making SBS potentially liable for inadvertently broadcasting certain material, the proposed amendments to the sedition laws would have a substantial chilling effect on the way SBS engages with its audiences. *Insight* and SBS Radio are examples of how SBS provides a meeting place for people from diverse backgrounds to share their concerns and interests. They are valuable forums for debate on matters of public interest, conducted in a constructive and non-inflammatory manner and moderated by SBS. The new laws could potentially significantly constrain this type of programming.

### **Good faith defence**

The 'good faith' defence, as currently drafted, is inadequate. It is limited to where the broadcaster was attempting to point out policy errors or mistakes, achieving changes to the legal status quo or matters intended to bring about the removal of hostility or ill-will. The media could not rely on this defence in relation to a number of important and legitimate activities, including informing the public on corruption, bias, dishonesty or political partiality. SBS submits that the good faith defence should not be limited by examples. There should also be consideration of a positive defence, as appears for example in the *Racial Discrimination Act 1975*, for matters done for genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest.

### 5. Sunset provisions

The 10 year entrenchment of provisions relating to certain of the above provisions is too long. Given the comparable nature of the legislation, a three year sunset period, as provided for in the *ASIO Act*, is both adequate and appropriate.

### Conclusion

The Anti-Terrorism Bill (No. 2) 2005 as it stands does not appropriately balance the need for security legislation and the need to maintain an informed and informing media that is able to report, in an open and responsible manner, on matters of public interest.

The amendments suggested above will substantially address this imbalance while maintaining the Government's policy objectives in enacting enhanced powers to deal with terrorism.

SBS would be happy to provide further information or comment to the Committee. Please contact Head of Policy, Julie Eisenberg on 02 9430 3813.

**Special Broadcasting Service  
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