

A SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL COMMITTEE

"These provisions have the potential to subvert entirely the conventional protections and established civil rights that our system has put in place over the last 200 years" *Ian Harrison, SC, President NSW Bar Association.*

"Individuals have international duties which transcend the national obligations of obedience ... Therefore [individual citizens] have the duty to violate domestic laws to prevent crimes against peace and humanity from occurring." *The Nuremberg Tribunal 1945-1946.*

"I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion." *Thomas Jefferson, September 28, 1820*

We- Colin Penter & Professor Gavin Mooney- are co convenors of the WA Social Justice Network, a network of individuals and groups working to achieve a more just and equitable society and institutions.

We welcome the opportunity to make a submission to the Inquiry.

On Friday November 4th 2005, the WA Social Justice Network organised a public forum at the University of Western Australia to discuss the Anti Terrorism Bill 2005. Despite short notice, the Forum was attended by over 500 West Australians and supported by 50 WA civil society groups, reflecting the depth of concern about this legislation among many Australian citizens.

SUMMARY

We wish to express our strong opposition to the Anti-Terrorism Bill (No 2 2005). We urge all elected members to oppose these draconian laws. We express outrage at the failure of the Australian Government, both houses of the Federal Parliament and State Governments to encourage informed public debate and scrutiny, and consult with the

Australian people in any meaningful way. Such contempt for democracy does great harm to the social and democratic fabric of this nation.

Like many Australians we want to express deep concern about the unprecedented powers contained in the Federal Government's Draft Anti-Terrorism Legislation.

Whilst we recognise the need for laws that reduce threats from terrorism, there is much in this legislation that appears to have little to do with terrorism.

The Anti Terrorism Bill 2005 contains draconian measures incompatible with a democratic state. Numerous commentators, including judges, and legal practitioners have highlighted the dangerous nature of various aspects of the Bill. We note the comments by various legal figures that the legislation leads the country towards a police state.

Never before has such an important piece of legislation been presented to the Parliament with such little scrutiny and public discussion. As a recent Age Editorial suggested the manner in which these changes are being handled is reminiscent of repressive regimes. It is disturbing that citizens wanting to respond to the Senate Committee have had totally inadequate time to consider and study the revised legislation.

Whilst our concerns are many, they fall into three main categories

- Broad concerns
- Concerns about the undemocratic nature of the process by which this legislation is being implemented
- Concerns about specific aspects of the legislation.

1. BROAD CONCERNS ABOUT THE LEGISLATION

We have the following serious BROAD concerns about the legislation:

- The Australian Government is trying to pass British style terrorism laws without the most important safeguards that exist in Britain, namely the 1998 Human Rights Act. Without such a

statutory Human Rights framework in Australia against which such laws can be assessed, we believe that the restrictions on human rights that result will be greatly disproportionate to the threats posed by terrorism.

- Australia is trying to pass a new law based on British laws before Britain has even finished considering its law. It is to note that the attempt to pass the laws there has also led to the first Parliamentary defeat of the Blair government in 8 years.
- The legislation directly contravenes several articles in the UN Universal Declaration of Human Rights (Articles 7,9,10,11,12,13,18,19).
- The effect of the legislation will be to remove fundamental human rights, such as the right to be judged under the law, the right to proper arrest and charge, the right to legal representation, the right to a fair and public hearing, the right to the presumption of innocence, the right to privacy, the right to move freely, the right to express dissenting and critical views without fear of punishment and the right to protest and mobilise to protect rights.
- Without adequate protections, Australians have to trust that politicians and government will not abuse those unprecedented powers. This is unacceptable in a democracy and given the history of such abuse of powers by politicians and governments is a cause of immense concern to many Australians. Because such powers are no longer subject to the rule of law, under this legislation the Federal Government acquires powers which can be all too easily abused.
- We are deeply concerned about the unrestrained exercise of executive and police power. Fundamental to Australian democracy is the separation of powers so that the executive and legislative arms of government and police forces do not exceed their authority. There is no adequate judicial oversight of the provisions or other safeguards against the unrestrained use of executive and police power. This makes for a police state.

- We believe that the anti-terrorism laws have the potential to criminalise many of the everyday activities of ordinary Australians.
- These laws can be used to silence debate and criticism of government policy and actions. Under the sedition clauses, disaffection with Government may attract 7 years jail.
- The laws will likely breach the civil, political and economic rights of many groups of Australians. As we understand it, the legislation makes specific reference to Aboriginal and Torres Strait Islanders, suggesting that Indigenous Australians will be targeted by the law. The legislation overrides existing State and Territory laws and policies put in place as a result of the Aboriginal Deaths in Custody Royal Commission (such as the requirement that police initiate contact with Aboriginal Legal Services or friend when an Aboriginal person is taken into custody).
- The dubious constitutionality of using State based legislation and policing and emergency services to override important protections in the Australian constitution should be opposed. We note the growing number of legal opinions that claim the legislation in its current form is unconstitutional. It is the responsibility of the Federal Government and State Governments to uphold the constitution not override and undermine it.

Though legal intimidation and suppression of dissent we believe the law will violate the freedom of speech, expression and association.

2. CONCERNS ABOUT THE UNDEMOCRATIC NATURE OF THE PROCESS

We are deeply concerned that the government is using and indeed fostering the community's fear of the "threat of terrorism" to gain acceptance for implementing these new laws on terrorism.

Laws that restrict rights should only be proclaimed after there has been fair opportunity for public scrutiny and debate. Sadly this is not the case with the Anti-Terrorism Bill 2005.

With respect to the processes surrounding the legislation, we are deeply concerned about:

- The speed with which this legislation is being implemented. The process has been unduly secretive and rushed and there has been inadequate time for citizens to be informed about and debate the bill. This has clearly been a deliberate strategy to avoid scrutiny and reflects badly upon all Federal and State Parliamentarians, and further diminishes levels of trust in elected representatives, governments, and ultimately democracy itself.
- The lack of time allowed for parliamentary debate
- The lack of time and information to allow an informed public debate
- The ‘underhand’ way in which the government had (i) not allowed even the state Premiers or the Opposition to see the bill as they intend to introduce it; and (ii) tried to prevent public debate for example by introducing the bill to the House of Representatives on Melbourne Cup Day when the nation’s eyes were averted.
- The capitulation of the Leader of the Opposition in his announced agreement to support the bill before he had seen it.
- The fact that such agreement between the two main parties further stifles debate and is deleterious to our democratic heritage.

How can a government be trusted if it is so contemptuous of its citizens and is so unwilling to allow considered public debate and scrutiny of such a critical and sensitive piece of legislation?

3. SPECIFIC CONCERNS ABOUT THE LEGISLATION

We have deep concern about specific aspects of the legislation and we would highlight how difficult it has been to assess the legislation adequately because of the secrecy and limited time frame that has surrounded its implementation.

We would make the following comments based on our understanding of identified provisions.

Use of Force provisions

We oppose totally any new power expressly authorising police to cause the death of a person who is not arrested because he or she is believed to have committed a criminal offence.

Control Orders

As we understand it the provisions provide for an Australian Federal Police officer to make an application to a court for a control order, the only precondition being that the Attorney General must give consent. This provides no safeguard whatsoever against the abuse of power, as the Attorney General would be highly unlikely to refuse to provide consent where sought by the Federal police.

Preventive detentions orders

We oppose the provision that allows a police officer to decide whether someone should be detained with only limited judicial oversight.

Persons not charged with or found guilty of criminal offences should not be imprisoned by the state.

We oppose the introduction of preventive detention orders in Australia. They are contrary to International human rights treaties.

Extending ASIO warrants

We understand the legislation increases the length of ASIO search warrants from 28 days to 3 months, and mail warrants from 90 days to

6 months. This seems unduly excessive and likely to lead to abuse by the authorities where there is no evidence of any criminal activity.

Arbitrary detention

We believe the law will violate the Australian people's right to be free of arbitrary detention.

We believe the provision for 14 days preventative detention (or longer in conjunction with state laws) is open to wide abuse by government and police authorities.

Sedition laws

We oppose absolutely the sedition provisions in the Anti Terrorism Bill. We are seriously concerned that the sedition clauses are so broadly written that they could be applied to much too widely defined criticisms of the government. These sedition clauses seem likely to have the impact of outlawing action, statements and even thoughts of dissent.

We are concerned that the sedition clauses will erode freedom of speech and artistic expression. The proposed sedition laws threaten Australia's proud tradition of protecting free speech and promoting democracy.

In the Proposed Act criminal "seditious intention" is expanded to include "urging disaffection against the government or promoting feelings of ill will and hostility between different groups so as to threaten peace, order and good government of the Commonwealth"

Any one breaking these rules or urging changes to the law by other than lawful means (such as civil disobedience or unauthorised non-violent protest) could be jailed for 7 years.

Who will define and decide the boundaries by which such urging of disaffection against the government will be considered as sedition? We

can only assume the Federal Government. This is an abuse of power, reminiscent of totalitarian and repressive regimes.

A wide range of legal advice and opinion suggests that critics of the Howard government, for example those critical of its decision to participate in what is seen by many Australians as an illegal invasion of Iraq, could be jailed for sedition under these clauses. Might these sedition laws also be used against Australians who express strong disaffection with the Federal Government's policies of inhumane treatment of refugees and asylum seekers? Or against Australians who engage in peaceful protest against the Federal Government's Industrial Relations Legislation? What of Australians who speak out and/or journalists who report the alleged abuse and mistreatment of David Hicks in Guantanamo Bay? Or journalists and writers who report honestly the views of Iraqi people who oppose the occupation of their country by coalition forces.

We are deeply concerned about the provisions in the Bill covering unlawful association, in particular the definition that includes any body that advocates or encourages the carrying out of seditious intention. This is defined as an intention to bring the sovereign into hatred or contempt, to urge disaffection against the constitution, the government and either house of parliament.

We are deeply concerned about the lack of a definition of good faith in the context of seditious intent. The onus is on the defendant to prove good faith. There are many examples of action that challenge the legitimacy claims to sovereignty by the Australian Government. One such example is the Aboriginal Tent Embassy. Under these laws individuals committing such actions could be charged under this definition of sedition.

We are convinced that it is unnecessary to add these provisions to existing laws. We call urgently for the sedition provisions to be removed for the following key reasons.

Sedition laws are:

Unnecessary - current law already prohibits inciting crimes, membership and funding of terrorist organisations, and racial vilification.

Dangerous - by their nature they are political and in similar form were used against Gandhi, Mandela, and the supporters of the Eureka Stockade.

Too broad – a person or an organisation could be charged with sedition without, as existing law requires, having urged force or violence.

Unfair - the sedition laws reverse the onus of proof. The accused will be assumed guilty and will need to prove their innocence. It will be almost impossible for them to do this under the proposed legislation.

Financing terrorism

We oppose the broadening of provisions that include the element of recklessness where people have no knowledge or intention of financing someone defined as a terrorist.

Legal representation

It is deeply troubling that a person not charged with any offence is denied access to face to face contact with a lawyer.

We oppose provisions that allow police monitoring of communications between lawyer and client.

Lack of a sunset clause

Of great concern to us is the apparent lack of a sunset clause. It is unclear whether these are temporary emergency measures or permanent laws which can be deployed over coming decades, regardless of the nature of threats.

CONCLUSION

We believe these laws go well beyond what is required to reduce the risk of terrorism in this country. If this legislation were to be enacted in the form that seems likely, then it would be a clear sign that the terrorists are winning in any desire they might have to undermine our democratic freedoms.