

## **Anti-Terrorism Bill (No 2) 2005**

### ***Inquiry by the Senate Legal & Constitutional Committee***

#### **Submission by the Australian Privacy Foundation**

The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. Relying entirely on volunteer effort, the Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. For information about the Foundation and the Charter, see [www.privacy.org.au](http://www.privacy.org.au)

#### ***General points of principle on the Bill***

1. While we welcome the brief window of opportunity offered by this Senate Inquiry, the relative lack of opportunity for public debate and scrutiny for changes to the law of this magnitude and significance is extremely disappointing. This is especially the case when compared to precedents such as changes in the last few years to both ASIO and Telecommunications Interception legislation, where a longer period of public and parliamentary scrutiny resulted in substantial improvements.

2. It is quite difficult to understand what the Bill actually does – scrutiny would have benefited from a marked-up copy of what the Criminal Code will look like with the proposed changes. We fear that we have probably not been able to detect, in the limited time available, all of the adverse privacy implications of the proposal. A longer period of consideration would allow all such implications to be identified and debated.

3. While we share the primary concern over the draconian provisions for control and preventative detention orders, and the revival of sedition offences; many other well-informed critics will be putting the case against them, and we will only make brief reference to our support for their concerns, from a privacy perspective.

4. We would like more particularly to direct the Committee's attention to several areas in which the Bill contains provisions which are not confined to terrorism offences but are part of a longstanding government 'wish' to give agencies extra powers – examples include:

- the AFP notice to produce information powers for 'other serious offences' (Schedule 6);
- the optical surveillance provisions (Schedule 8);
- changes to the Financial Transaction Reports Act (Schedule 9), and
- extended powers of Customs officers (Schedule 10)

Detailed analysis of all these is given below. In our view there is no need to rush these changes through on the back of the supposedly urgent 'orders' provisions – they should be considered over a longer time period, preferably in the context of related reviews such as those of the Privacy Act and the Anti-Money Laundering Legislation.

5. The government's attempts at re-assurance in relation to this Bill so far rest largely on appeals to 'trust us'. Surely history (even recent history) tells us that governments and bureaucracies even here in Australia cannot be trusted – particularly with powers as draconian as these - without greater transparency, accountability and safeguards.

6. It is dishonest of the government to pretend that these are only 'temporary' measures needed for exceptional circumstances. The definitions of terrorism being used mean that the threat will remain indefinitely (as it has for at least the last forty years, without the need for these measures).
7. Analogies with precedent of emergency powers during previous predictably finite wars are therefore false – governments have defined a war on terror in a way that ensures it will be permanent. We must therefore debate these powers on the assumption that they will be permanent too.
8. Sunset clauses are better than nothing (and must be shorter) but they are no substitute for proper justification up front. It is always more difficult to repeal laws once established, even if the powers are not used.
9. In any event, there are no sunset clauses for many of the provisions of the Bill. While this may be reasonable for some minor technical amendments, it is not acceptable for the significant changes, all of which must be subject to a relatively short sunset period.
10. What is the evidence of the need for these changes? We have seen no evidence, as opposed to assertions, that the London bombings really change anything about the threat posed to Australia. The official risk assessment hasn't changed. Intelligence agencies have backed away from suggestions that there are hundreds of dangerous extremists in Australia – the figure apparently used to scare the Premiers into their initial agreement.
11. The government has also failed to provide any reasoned justification as to in what respects the existing laws – already significantly extended in recent years, are not adequate to deal with particular threats.
12. What is the evidence of urgency? Why do we suddenly need to rush these powers in without even adequate debate when we have lived without them until now – even after New York, Madrid, and London?
13. What is the evidence of effectiveness? Let us have examples of where the lack of these powers has actually hindered investigation/prevention. Even hypotheticals – not just assertions – it would be helpful to understand possible situations where these powers would be needed.
14. Governments must seriously consider whether the proposals are not actually counter-productive – even dangerous. Many experts believe that taking such powers will simply act as a recruiting tool for extremists – and that we are simply playing into their hands by making these changes.
15. What is the evidence of proportionality? We need a debate about whether the loss of *everyone's* civil liberties is worth any marginal benefit to law enforcement/intelligence.
16. It is not acceptable to say that *any* value to the police or ASIO is worth the loss of rights and freedoms – governments are always saying no to the agency 'wish lists', even on grounds of cost, let alone loss of fundamental rights. Why is this a different situation?

### ***General concerns about severely limited judicial oversight***

17. Judicial oversight of the operation of the new provisions appears to be limited to judicial review of process – there is no provision for merits review of the basis of the decisions. Judicial involvement only applies to some of the key provisions and not others. Furthermore many decisions under the new provisions are expressly excluded from review under the ADJR Act (Schedule 4 Part 2).

18. The role of judicial oversight is not only to protect the innocent victim – it is an anti-corruption measure.

19. The role of judges and magistrates in some of the provisions amounts to an executive role in fundamental conflict with their judicial functions. The community was told by this government in the 1990s that this conflict prevented federal court judges from issuing warrants for telecommunications interception – to justify moving that function to AAT members without the same independence (even though issuing warrants does not amount to punishment as control orders do). Now it suits the government to co-opt the judiciary into an even more clearly executive role. We note that this issue has now been raised as a more general criticism of the Bill.

20. It is misleading to describe the proposed involvement of judges as ‘judicial’ since it is in many cases to be performed in their ‘personal’ capacity. Also, to the extent that individual judges may decline to take on this role, this further erodes the purported assurance of independence – by definition those involved will be ‘volunteers’ who presumably agree with the legislation, while the sceptics who might bring a more rigorous standard to bear on applications will have excluded themselves.

### ***Particular privacy concerns***

21. The Bill has serious implications for several aspects of privacy:

- Bodily & Territorial privacy – including the control order provisions, but also the provision for an escalating scale of intrusions from searches through physical restraint to violent action up to and including ‘shoot to kill’
- Communications privacy – including provisions for monitoring communications and banning communications even between family members about the whereabouts of their children
- Information privacy – including the mandatory collection of information about both suspects and wholly innocent ‘associates’, the uses and disclosures of which will not be ‘transparent’, and which can be expressly kept secret from the individuals concerned

22. Because of the looseness of the definition of terrorism, and the fact that powers can be exercised in relation to third parties other than those suspected of any intent to commit violence, the privacy implications extend well beyond such suspects. The breadth of the legislation would appear to catch, potentially, anyone whom the intelligence agencies or police think *might* have relevant information or *might* be involved in any way even without knowing. This is not only unacceptable in its own terms but is likely to have a major ‘chilling’ effect on freedom of speech and legitimate dissent.

### **Schedule 3 - Financing Terrorism powers**

23. The financing terrorism provisions in Schedule 3 would criminalise ‘inadvertent’ contributions to organisations which themselves may contribute to legitimate political activity without knowing about any associations with violent extremists. Individuals, and organisations acting in good faith cannot be expected to know enough about these potential links to make a judgement. Criminal offences should only apply to financial contributions made in the full knowledge that they will be used to fund criminal activity. Otherwise, two things will happen - a vast number of individuals will inadvertently expose themselves to criminal prosecution, and some people will be deterred from contributing to legitimate social and political movements which criticise current government policies or even those that don’t. Both are undesirable.

### **Schedule 4 - Control and preventative detention orders**

24. Many of the obligations, prohibitions and restrictions that can be included in a control order are highly intrusive into the subject’s territorial and communications privacy and, in the case of the tracking device, into their bodily privacy as well (such a device will presumably take the form of an irremovable bracelet). Further privacy intrusions would be necessary in order to monitor compliance with some elements of a control order such as limitations on telecommunications use. We strongly believe that no-one should be subjected to these intrusions who has not been charged with a specific offence and given the opportunity to challenge the charges in a court of law, with full legal representation.

25. If control orders are to be allowed in any form, they should certainly not be for a renewable period of twelve months – that is far too long a time for the authorities not to have to demonstrate the continued need for the order. We note that a maximum period of 3 months is to apply to 16-18 year olds (proposed section 104.28). In our view, the authorities should be required to re-apply for a control order on any individual after no more than one month. The provision of the right for a subject to apply for revocation of a control order is no substitute for a regular requirement on the authorities to justify the need. Because a subject is only able to see the control order itself and not the justification, how could they know what arguments or evidence to use in support of an application to revoke? The whole control order regime offends against fundamental legal principles and rights.

26. If the need for these new powers is so urgent and justified by the allegedly heightened risk of terrorism, it is difficult to see why the government sees no need for control orders or preventative detention orders to apply to children under the age of 16. Surely there are enough precedents for children being involved in terrorism for this to be a glaring anomaly and expose a major weakness in the justification for the new powers. If an arbitrary age limit is applied – presumably to assist the ‘saleability’ of the proposals - then one must question how necessary they really are?

27. It is difficult to see the value of the supposed safeguard of clause 104.12(1)(c) in light of proposed section 104.12(3) & (4), and similarly the value of proposed section 105.28 and 105.29 in light of 105.31, and of 105.32 (1) and (4)-(8) in light of 105.32(12).

28. Proposed section 105.44 suggests that a person may be held in preventative detention for up to 12 months – otherwise there would be no need for 105.44(3) about the destruction of identification material. This undermines the impression given elsewhere that preventative detention would only be used as a very temporary measure before charges are laid.

29. The prohibition in proposed section 105.41 on third parties contacted by a detainee disclosing even the fact that the individual has been detained is inherently objectionable, and the application of this prohibition to other family members is simply absurd and impracticable.

### **Schedule 5 - Identification, questioning, search, restraint etc powers**

30. The extent to which the provisions not only in Schedule 5 but also in various other schedules to the Bill relating to identification, information gathering, search, entry to premises, restraint and lethal force provisions are 'new' or differ from existing powers is not clear. If they are different, then this must be better justified. What *is* clear is that the powers will apply to a much wider range of individuals, including those who are not even suspected of criminal offences. There must be more debate about the proportionality of applying these powers to such people.

### **Schedule 6 - Information gathering powers**

31. The AFP "notice to produce" powers would have the effect of overriding privacy protections, as disclosure required or authorised by law is an exception in the disclosure principles applying to both Commonwealth agencies and the private sector under the Privacy Act 1988. Not content with this, proposed section 3ZQR expressly provides that notices to produce overrule not only privacy laws but also legal professional privilege, duties of confidence and any other public interest.

32. Proposed section 3ZQN provides the AFP with a notice to produce power in relation to serious terrorist offences without any independent judicial involvement. No justification has been provided as to why information cannot be obtained by using existing search warrant provisions, subject to judicial oversight. If time is a factor, why not just spend resources on the availability of judges to approve warrants?

33. Proposed section 3ZQO provides for notices to produce in relation to serious offences *other than terrorist offences*. While these would require authorisation by a federal magistrate, no justification is provided for including this power in an anti-terrorism Bill. We note that the AFP asked for this power in its submission to the recent reviews of the Privacy Act, without specific reference to terrorism. The list of matters to which a notice to produce can relate (in proposed section 3ZQP) includes matters which would clearly be of interest to police in a wide range of other investigations. Why is the government dealing with this in the context of the rushing-through anti-terrorism legislation instead of in its hopefully considered response to the Privacy Act reviews? This is an example of **'a power grab by stealth'** i.e. slipping provisions into legislation that go well beyond the apparent objective of that legislation, to prevent separate debate about those provisions in the proper context. This smacks of rank opportunism -- and should be strongly resisted.

34. Proposed section 3ZQT prevents someone served with a 'notice to produce' from informing any other person (other than those involved in responding, and the person's own legal advisers). This is an unacceptable obstacle to accountability.

## Schedule 7 – Sedition etc

35. The changes to sedition law in Schedule 7 appear to possibly cover ordinary advocacy activities – by NGOs or unions – which encourage civil disobedience as a peaceful way of advocating for law reform. It would also appear to threaten the right to disagree with the government about important policy decisions – such as our involvement in Iraq. Many thousands of Australians legitimately challenge that involvement, and many other actions of this and previous governments of all political colours. For example, proposed subsections 80.2(7) and (8) suggest that certain legitimate views in relation to the involvement in Iraq could fall foul of the Act, and the defence of ‘good faith’ provided by 80.(3) is not a sufficient guarantee that these provisions could not be used by this or future governments to suppress dissent. Having to rely on this uncertain defence will inevitably have a chilling effect on freedom of speech.

36. What guarantees are there that individuals will not fall foul of the offence provisions ‘retrospectively’ e.g. by supporting an organisation that is subsequently declared to be a ‘terrorist’ organisation?

## Schedule 8 - Surveillance devices

37. The effect of the provisions in Schedule 8 amending the Surveillance Devices Act 1984 is not clear and must be explained so that the provisions can be properly debated. Schedule 8 provides for a Code regulating and authorising optical surveillance at airports and on aircraft. However, proposed sub-section 74J expressly provides for the purposes of the optical surveillance to include prevention etc of any Commonwealth offences. This is another example of a ‘**power grab by stealth**’ – introducing powers with much wider reach, which deserve much wider debate by the many interested parties, as part of supposedly purpose specific anti-terrorism legislation. Another danger here lies in the balance that any Code would strike between authorisation on the one hand and regulation, with safeguards on the other. It is not clear if a Code issued under this Schedule would be a disallowable instrument. If not, it should be.

## Schedule 9 - Financial Transaction Reporting

38. The extensive changes to the Financial Transaction Reports Act 1988 proposed in Schedule 9 are yet another example of ‘**a power grab by stealth**’ – introduction of provisions with much wider reach, which deserve much wider debate by the many interested parties, as part of supposedly purpose specific anti-terrorism legislation. The appropriate place for these provisions are in the proposed anti money-laundering legislation, which have quite properly been the subject of recent consultation at least with industry (albeit with limited opportunity for wider community input).

## **Schedule 10 - ASIO & Customs powers**

39. The changes to ASIO powers contained in Schedule 10 are not adequately justified (other than some technical changes which seem unobjectionable). We understand that the former Director-General of ASIO – Mr Richardson - stated publicly earlier this year that he considered ASIO's powers to be adequate and that he was not seeking further powers. The government has produced no explanation for why this assessment is no longer valid.

40. We are particularly concerned about the changes to the warrant regime. The last round of amendments to the ASIO warrant regime benefited greatly from a lengthy period of Senate Committee scrutiny. This Schedule (Items 12, 16 & 17, 18 & 20) would effect significant increases in the period of validity of warrants, which would represent a further weakening of the safeguards and oversight provided by current requirements for renewal of warrants.

41. This Schedule (Item 2) also extends the power of ASIO to require information from operators of aircraft and ships, to parallel the extension for the AFP under Schedule 6 Item 1. As with those provisions, there is inadequate explanation of the extent of the changes, and the justification for them, to allow for us to make a judgement as to their proportionality. But clearly any extension of compulsory information gathering powers outside of a judicial warrant regime are a matter of concern and need to be examined carefully.

42. The Schedule (Items 29 & 30) also changes Customs legislation to widen the range of matters for which Customs officers can copy documents. We are concerned that the breadth of the definitions of security and intelligence matters means that this is a significant extension of Customs powers, again not restricted to terrorism related matters. Any such general extension should be the subject of considered debate in a separate context.

## ***Conclusion***

43. We call on the Committee to, preferably, recommend rejection of this Bill without a longer period of debate. As a second best alternative, the Committee should recommend significant changes to avoid the worst consequences, as outlined in this submission. The Committee should only indicate support for any of the provisions if it is convinced, on the basis of much better evidence and argument than has been offered to date, that the particular proposed amendments:

- are necessary,
- will have the net effect of reducing the likelihood of terrorism in Australia, and
- are a proportionate response to that threat

44. We specifically call on the Committee to recommend the exclusion of those provisions that are not directly related to terrorism and which represent a surreptitious and opportunistic bid for greater general powers. These provisions, clearly identified in this submission, should be debated separately and at greater length in a more appropriate context.

45. Governments must not trade precious rights and freedoms which protect all Australians from abuses of government power for an illusion of greater security.

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