

TERRORISM

Laws for insecurity

ANNIE PETTITT and VICKI SENTAS offer an overview of proposed new counter-terrorism laws.

On 8 September 2005, the federal government announced its proposal for significant changes to Australia's counter-terrorism laws. The announcement was made two weeks before the Council of Australian Governments (COAG) meeting, where the Prime Minister would ask all State and Territory leaders to support the proposals. In the ensuing weeks there was much public concern about the proposals. The most comprehensive response to date to the Prime Minister's proposals is the *Laws for Insecurity?* report prepared by a coalition of community lawyers, advocates and legal academics.¹

Yet for over five weeks the Anti-Terrorism Bill 2005 ('the Bill') was not actually made available to the public. On 14 October Jon Stanhope, Chief Minister of the ACT, posted the draft Bill on his website, as he believed 'it was important that as many people and organisations as possible had the opportunity to examine the proposed draft and convey their ideas and suggestions to the Premiers and Chief Ministers'.²

On 2 November, the government announced that 'specific intelligence and police information ... about a potential terrorist threat' had been received and it rushed through a separate Anti-Terrorism Bill 2005.³ This amended the definition of a terrorist offence in the *Criminal Code*, essentially replacing 'the' with 'a'. This effectively links several terrorism offences with a general rather than a specific threat or act. The following day the original Bill was introduced into Parliament as the Anti-Terrorism Bill (No 2) 2005, with minor amendments and minor concessions on judicial review. There is still grave concern, however, that the Bill is a disproportionate and draconian instrument that 'remains incompatible with Australia's obligations as a signatory to the *International Covenant on Civil and Political Rights*'.⁴

One of the most concerning aspects of the whole affair has been the lack of transparency and openness to public consultation and dialogue. The original proposed timeline for the Bill to proceed through both Houses of Parliament was less than a week, with the Senate Legal and Constitutional References and Legislation Committee having at the most one day to review and report on the Bill. Following much public concern the Committee was given three weeks to conduct its inquiry and requested to table its report on 28 November.

This process is in stark contrast to the UK. Following the London bombings in July 2005, the UK Terrorism

Bill was made publicly available one month before it was introduced into Parliament. Indeed, the critical report of the Independent Reviewer, Lord Carlile QC was also made publicly available. In contrast, Prime Minister Howard has not released the legal advice he has received.⁵

The proposals involve complex and detailed amendments. In what follows we consider key aspects of the specific proposals.⁶

Shoot to kill

While the specific 'shoot to kill' provisions have been removed, it is questionable if this makes any material difference. Federal and State police taking someone into preventative detention are still being given power to use the same force as if they 'were arresting the person, or detaining the person, for an offence'.⁷ This includes the use of lethal force.

Control orders and preventative detention

The Bill introduces control orders and preventative detention, which are largely based on the *Prevention of Terrorism Act 2005* (UK); however there are some significant distinctions. Most importantly, the *Human Rights Act 1998* (UK), which incorporates the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) into UK domestic law, provides some important safeguards and checks on the exercise of executive powers.

Control orders

The Bill will empower the Australian Federal Police (AFP) to request an interim control order when they believe on reasonable grounds that 'it would substantially assist in preventing a terrorist act' or 'that the person has provided training to, or received training from, a listed terrorist organisation'.⁸ While the request will have to be reviewed by a Federal Court, the issuing of a control order does not require that the person be charged, tried or found guilty of any offence. Control orders can be issued for up to 12 months for adults and three months for children between 16 and 18 years, and there are provisions for 'rolling' control orders — so when one finishes another begins. Among other things, control orders will provide for the use of tracking devices; restrictions on association, access to specified services, and movement; and house arrest. The general criminal standard of proof of 'beyond reasonable doubt' does not apply to the issue of control orders, rather it is the lower standard based on

REFERENCES

1. Agnes Chong et al, *Laws for Insecurity? A Report on the Federal Government's Proposed Counter-Terrorism Measures* <<http://www.civilrightsnetwork.org/articles/LawsForInsecurityReport.pdf>>.
2. Jon Stanhope, Chief Minister, ACT, 'Chief Minister Makes Public Draft Terror Legislation' (Media Release, 14 October 2005) <<http://www.chiefminister.act.gov.au/media.asp?media=692§ion=24&title=Media%20Release&id=24>>.
3. 'PM fast-tracks terror laws' *The Age* (Melbourne), 2 November 2005.
4. Advice provided by Lex Lasry QC and Kate Eastman to Jon Stanhope. Jon Stanhope, 'Bill Still Fails Human-Rights Acid Test' (Media Release, 1 November 2005) <<http://www.chiefminister.act.gov.au/media.asp?media=770§ion=24&title=Media%20Release&id=24>>.
5. ABC News Online 'Stanhope calls for PM to release legal advice', 2 November 2005 <<http://www.abc.net.au/news/newsitems/200511/s1495670.htm>>.
6. For a chronology of terrorism legislation see the Parliamentary Library <<http://www.aph.gov.au/library/intguide/law/terrorism.htm>> and the BillsNet for the text of the Bills <<http://www.aph.gov.au/bills/index.htm>>.
7. Anti-Terrorism Bill (No 2) 2005, Schedule 4, inserting new *Criminal Code* s 105.19(2).
8. Anti-Terrorism Bill (No 2) 2005, Schedule 4, inserting new *Criminal Code* s 104.2(2).

the 'balance of probabilities'. The preemptive nature of these powers marks a significant departure from the legal principle of 'innocent until proven guilty'.

Preventative detention

Under a preventative detention order it will be possible to detain someone without charge or trial for up to 14 days if it is believed that there is likely to be a terrorist attack in the next 14 days, or there has been a terrorist attack in the last 28 days and it is necessary in order to preserve evidence.⁹ It would be essentially unconstitutional for the federal government to authorise detention without charge for such an extended period. As a result, the Bill will require State and Territory police to detain someone suspected of involvement in a terrorist attack for 12 days following an initial 48 hours detention by the AFP. Further, the provisions confer non-judicial power on Federal Court judges, and provide that in issuing a preventative detention order they act in their *personal capacities*.¹⁰ In this way the government has effectively circumvented one of the fundamental principles in our constitution by breaching the separation of powers. As former Chief Justice of the Family Court, Alastair Nicholson stated, '[t]he provision for judicial review is no more than window-dressing ... this is no safeguard and ... the judge is little more than a rubber stamp'.¹¹

It is also concerning that control orders and preventative detention orders will be issued *ex parte*, that is, in the absence of the person subject to the order. As a result there are no provisions for the subject of an order to have access to relevant information prior to the issuing of the order.

While the UK *Prevention of Terrorism Act 2005* has provisions for control orders and preventative detention, they remain firmly within the existing criminal law model of investigation and charge. Unlike the Australian proposals, preventative detention in the UK is not secret and the UK judiciary has greater scrutiny over such excessive executive powers.

Sedition

The Bill repeals existing sedition offences in the *Crimes Act 1914* (Cth) and introduces five new sedition offences into the *Criminal Code* (Cth) punishable by up to seven years imprisonment. Many of the new offences largely overlap with the existing crimes of incitement to treachery and treason, which are archaic security offences used historically to criminalise communist politics.

Sedition offences are expanded with the new offence of urging a group (whether distinguished by nationality, race or religion) to use force or violence against another group, anywhere in the world, where this would threaten the peace, order and good government of Australia. The offences do not require an intention that force or violence be committed, or evidence of an actual act of force or violence.

It will also be an offence to urge someone to 'engage in conduct' which would assist an organisation or country

engaged in armed hostilities against Australia's defence forces, or an organisation deemed to be an 'enemy' of Australia.

Yet it is already an offence under Australian law, punishable by life imprisonment, to threaten politically-motivated violence with the intention of intimidating a section of the public.

The provisions are likely to criminalise the advocacy of armed resistance against occupying forces in Iraq, a war recognised as unlawful in international law. The opinion expressed by journalist John Pilger on ABC's *Lateline* last year that Coalition troops in Iraq are legitimate targets, and that it is desirable that America be militarily defeated, has been considered by recent legal advice to arguably breach the proposed sedition offences.¹² While it is unlikely that Pilger would be prosecuted, the racialised nature of security policing may lead to the criminalisation of similar statements made by Muslims as 'incitement'.

A limited 'good faith defense' applies only to pointing out errors of government policy and lawful reform activity. The expansive reach of sedition and incitement will normalise the political persecution of 'thought crime' and will repress public debate on critical issues of war, violence and state crime.

Banning organisations

The proposal to ban organisations on the grounds of 'advocacy of terrorism' will exacerbate the arbitrary nature of the existing proscription regime. Advocating terrorism is defined as 'praising the doing of a terrorist act', 'directly or indirectly counselling or urging the doing of a terrorist act' or 'directly or indirectly providing instructions on the doing of a terrorist act'.¹³ Proscription triggers a number of serious offences, not on the basis of involvement in any terrorist act, but by mere association with an organisation that has 'advocated terrorism'. This will potentially impose a blanket punishment for hundreds of people. For example, being an informal member of such an organisation carries a sentence of 10 years.

Stop and search powers

Both Federal and State police will have broad discretionary power to stop, and demand name, address, and reasons for being in a Commonwealth place (such as an airport), in certain circumstances. If the police believe someone 'might have just committed, might be committing, or might be about to commit a terrorist act' they may search persons, vehicles or anything under that person's control.¹⁴ Such broad preemptive discretion represents a significant erosion of already very limited restraints on arbitrary police power and a violation of privacy.

Further, the federal Attorney General will be empowered to declare a Commonwealth place to be a 'security zone' for up to 28 days. This declaration rests on the grounds of 'preventing a terrorist act occurring, or in responding to a terrorist act that has occurred'.¹⁵ Rather than requiring reasonable suspicion, police are

9. Anti-Terrorism Bill (No 2) 2005, Schedule 4, inserting new *Criminal Code* s 105.4.

10. Anti-Terrorism Bill (No 2) 2005, Schedule 4, inserting new *Criminal Code* s 105.18

11. Alastair Nicholson, 'Farewell to freedom', *The Age* (Melbourne), 13 October 2005, 15.

12. Bret Walker SC and Peter Roney, 'Memorandum of Advice', 24 October <<http://www.abc.net.au/mediawatch/img/2005/ep34/advice.pdf>>

13. Anti-Terrorism Bill (No. 2) 2005 Schedule 1, Items 9 inserting new *Criminal Code* s 102.1(1).

14. Anti-Terrorism Bill (No. 2) 2005 Schedule 5, Subdivision B inserting new *Crimes Act* s 3UD.

15. Anti-Terrorism Bill (No. 2) 2005 Schedule 5, Subdivision B inserting new *Crimes Act* s 3UJ.