

The Anti-Terrorism Bill (No.2) 2005: an overview

The Anti-Terrorism Bill (No.2) 2005 (the Bill) is a complex piece of legislation that consists of over 130 pages of changes to the law. The Bill is divided into 10 'schedules' or chapters. Due to space limitations, this article examines only the changes that most severely impact on our civil liberties.

It should be remembered that the Bill (which will be federal legislation) will soon be complemented by State legislation that will introduce even more complexity and severity.

Schedule 1: definition of terrorist organisation

Currently, an organisation can be officially labelled a 'terrorist organisation' by a court or by the federal Attorney-General. A terrorist organisation is an organisation that '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)'.

Eighteen organisations are presently listed as terrorist organisations – every single one of them is Muslim and all have been nominated by the Attorney-General (Terrorist Organisations, 2005).

The Bill adds an additional definition for a terrorist organisation: an organisation that 'advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur)'. Advocating a terrorist act involves directly or indirectly counselling, urging or providing instruction on the doing of a terrorist act; or directly praising the doing of a terrorist act.

It is already a criminal offence to be a member of a terrorist organisation or to associate with one. The proposed broadened definition of a terrorist organisation means that, when an organisation's leaders praise a terrorist act, every member of that organisation instantly becomes a criminal. 'Praising' a terrorist act does not mean that the organisation is actively engaged in organising or inciting terrorist acts, presumably it will be enough simply to express one's opinion. Such an opinion, in the current climate, is a dissenting opinion. This provision will criminalise such dissent.

Schedule 3: financing terrorism

It is currently a crime to provide or collect money and to be *reckless* about whether that money will be used to fund a terrorist act. The new Bill also makes it a crime to intentionally give money to, or collect money for, someone and to be *reckless* about whether that 'someone' will use the money to fund a terrorist act. Both of these offences attract a maximum penalty of life imprisonment.

This new provision has Australian charities very worried. There is no exemption for humanitarian aid. So anyone who gives money for tsunami aid in Indonesia or earthquake aid in Pakistan and who does not inquire into where the money will end up, could be committing a crime if the money ends up in the hands of Al Qa'ida, Jemaah Islamiyah or Lashkar-e-Tayyiba. In fact, the Australian Wheat Board is guilty of this offence because it unknowingly (and recklessly) pumped millions of dollars into a trucking company that turned out to be a slush fund for Saddam Hussein.

Any Australian who sends money to family or friends in the Middle East could be guilty of this offence if the recipient chooses to pass the money on to a terrorist organisation – even though the Australian citizen never intended to fund terrorism.

Obviously this offence is overbroad and disproportionate to its aim. The law would be vastly improved by requiring full intent to fund terrorism, rather than simply recklessness.

Schedule 4: control orders and preventative detention

Control orders

A control order is an order of a court that restricts what an individual can do, where they can go and to whom they can talk. Among the many conditions a court can impose on an individual are:

- excluding a person from specified places;
- prohibiting or restricting a person from leaving the country;
- requiring a person to wear a tracking device;
- prohibiting or restricting who a person can talk to (including his or her lawyer);
- prohibiting or restricting someone from using telephones or the internet;
- requiring a person to report to police on a regular basis; and
- requiring a person to allow police to photograph and fingerprint them.

A control order can last up to twelve months for an adult, or up to three months for people between 16 and 18 years of age. There is no prohibition on issuing another order once one has expired. Theoretically a person could be forced to live under a control order for ten years – until the sunset clause kicks in and this legislation ceases to be law.

A court can make a control order if it is satisfied, on the balance of probabilities, that the order would 'substantially assist in preventing a terrorist act'. It does not matter that the person is not planning, or aiding someone who is planning, a terrorist act. It does not matter that the person has not been charged with, or convicted of, a terrorist offence.

A court can also make a control order if it is satisfied, on the balance of probabilities, that a person has been a trainer for, or been trained by, a terrorist organisation. Anyone who trained with these organisations before they were labelled 'terrorist organisations' will nevertheless be guilty of this offence. A person who trained with Al Qa'ida in Afghanistan to fight the Soviet invaders or to fight with the Muslims in Kosovo (on the same side as Australia in both conflicts) instantly becomes a potential target for a control order.

A control order is really just bail or parole, or even in some cases home detention, for innocent people. It permits people to be punished, and their liberty restricted, for what police believe they *might* do, rather than what they have done or what they are planning to do. The Attorney-General has been quoted as stating that control orders are intended to reduce the need for expensive covert surveillance by simply restricting the liberty of (innocent) persons of interest to police.

Preventative detention

The purpose of preventative detention is to hold a person, without charge, whom police reasonably suspect:

- will engage in an imminent terrorist act;
- has a 'thing' that will be used in an imminent terrorist act; or
- is planning to engage in an imminent terrorist act.

Usually, if a crime is imminent and police reasonably suspect a person's involvement in that crime, then police arrest and charge that person with conspiracy or attempt. Given that the Bill requires an *imminent* terrorist act, there is no reason why police cannot simply charge the person with conspiracy or attempt to commit that imminent terrorist act.

When subject to a preventative detention order, a person is effectively held incommunicado. Though the person is able to contact one family member, during that contact all the person is allowed to say is: 'I am safe but unable to be contacted for the time being'. It is an offence for the family member to pass on the information to anyone.

Police can monitor all communication between a lawyer and a person held under a preventative detention order.

Neither the police nor ASIO can question anyone who is being held under a preventative detention order. This begs the question: what is the order really for? It begins to resemble the kind of executive warrant by which medieval monarchs locked up their enemies in towers – without charge, without trial, without interrogation.

A preventative detention order allows a person to be detained for 48 hours. This is because the Constitution protects Australians from being held any longer. However, complementary State legislation is expected to permit people to be held without charge for a much longer period - up to 14 days. It is not yet known whether State legislation will permit the police to re-apply for an order once it runs out. If it does, a person could be held under preventative detention for ten years – until the sunset clause kicks in.

Schedule 5: increased police powers to stop, question and search people

The Bill grants police new powers to stop, search, seize and demand personal details (name and address) from people in areas controlled by federal authorities, such as airports and shipping docks. The powers can be used when a police officer reasonably suspects that a person is involved in a terrorist act.

These new laws apply to *all* serious federal offences, not just terrorist offences. These powers are subject to a ten year sunset clause.

The powers can also be used in an area that the Attorney-General declares a 'prescribed security zone'. In a prescribed security zone, a police officer is not required to form a reasonable suspicion. It is enough that a person is inside that zone. This means that if the Attorney-General declares Sydney airport a prescribed security zone, then absolutely everyone in it can be detained, questioned, searched and have items seized from them by police.

Schedule 7: sedition

This Bill introduces several new sedition offences. Controversially, some do not require an incitement to violence. Under the Bill, it becomes a crime to urge someone to assist an organisation or country that is at war with Australia (even an undeclared war) or that is engaged in armed hostilities with the Australian Defence Forces.

A person can argue in their defence that they were providing humanitarian aid, or speaking 'in good faith'. Speaking in good faith includes pointing out 'errors or defects' in the government, Constitution, legislation or courts of Australia. Among other things, acting in good faith also includes participating in an industrial dispute.

There is no defence for artistic, journalistic or academic expression. It is possible that it will become unlawful to criticise Australia's involvement in an unjust war, or at the very least it will place a chill over such dissent.

Defending or trading away our liberties?

In a country like Australia, without a Bill of Rights, we have the liberty to do what the law does not prohibit. There is limited scope for the courts to check and balance the excesses of Parliament. Whenever Parliament passes a restrictive law our civil liberties are eroded.

The Bill represents an enormous attack on our civil liberties – on several fronts. Freedom of speech itself is attacked in the sedition laws. Freedom of movement, religion and association (among others) are attacked by control orders. Freedom from arbitrary detention is attacked by preventative detention orders, which could result in detention without charge for a fortnight.

Terrorism is a real threat, but we should not trade away our liberties in the name of defending them. If we do, we will be left with nothing to defend.

References

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