The Anti-Terrorism Bill (No 2) 2005

Introduction

1. This submission makes the following main arguments:

   (i) The case for preventative detention and control orders has not been made out.

   (ii) The procedures surrounding preventative detention and control orders fall significantly short of the full judicial review of the merits.

   (iii) The proposed amendments to the law of sedition ought to be deferred pending a full review of the need for a general sedition offence in the light of new specific terrorism offences.

The Case for Preventative Detention and Control Orders Has Not Been Made Out

2. For the reasons set out in Appendix 1, the proponents of Preventative Detention and Control Orders have not justified their introduction. The arrest and charging of 17 suspects on 8 November 2005 showed the

proper and public operation of the criminal justice system, where the suspects were arrested, charged, brought before a court as soon as possible, and had the opportunity to apply for bail.

3. Supporters of these extreme measures have a heavy onus to present detailed scenarios which show their necessity. The Metropolitan Police did present a detailed set of scenarios to support their argument for an extension of the period of preventative detention to 90 days. Ultimately, they failed to justify the extension because critics of their position were able to rebut the factual basis of their case, or to show why the objectives they pursued could be achieved in other ways.

4. The case for similar measures in Australia is much harder to make. In the absence of a specific and detailed case, one is forced to speculate about the sorts of scenarios the government has in mind when proposing preventative detention and control orders. The closest we have come to specifics about the sorts of threats we face is the arrests on 8 November 2008. Presumably, information about the activity leading to those arrests was part of the justification for preventative detention and control orders put to COAG. But that scenario shows the existing law was adequate to deal with the situation.

5. Australia's large array of broadly defined terrorist offences, coupled with the general laws relating to *preparatory* offences – principally, conspiracies or incitement to commit *any* crime, coupled with broadly defined offences relating to terrorists acts, terrorist group membership and training offences – mean that the case for preventative detention and control orders has to be based on information which would not justify a charge for *any* of these planned offences. Curtailment of freedom based on conduct which does not even justify charges for these types of preparatory offences goes too far. The nebulous nature of information such as that leaves too much scope for error.

Judicial Review

6. No doubt cognisant of the radical nature of these proposals, the Prime Minister and the Premiers promised the safeguard of judicial review. No doubt members of the public thought this meant that the police would have to produce evidence justifying the order to an independent judge, and that the person subjected to the order would have the opportunity to challenge the prosecution case at a proper hearing. Even a person charged with murder – a specific offence concerning past conduct – has the right to be charged and brought before an independent court within a few hours of arrest and charge.

7. The expectation that the provisions would contain a full hearing on the merits was heightened by promises that the Bill as introduced – in contrast with the one published on the internet - would include merits review. The provisions for both control orders and preventative detention orders fall significantly short of that model. There is no full hearing of a preventative detention order during its 48 hour period. (We can only speculate about what the position will be in relation to the 12 day extension of such orders under state provisions.) The position is better for control orders but there are significant defects.

8. This is not what was promised. The public is right to expect the full due process model in view of the extraordinary powers sought and the promises made. This is fundamental to the separation of powers and the rule of law. Legislation is made by Parliament, the Executive brings prosecutions for breaches of those laws, and independent Courts adjudicate alleged breaches of law according to rules of procedure and evidence.

9. The English *Prevention of Terrorism Act* 2005 adopts just that model for control orders. (s4)[1] The police apply for a control order at a preliminary hearing in the absence of the person in question. If a control order is made, there must be a full hearing within 7 days. Before the full

[1] See the relevant provisions in Appendix 2.

hearing, the police must place all relevant evidence before the court and (subject to security) they must provide the controlled person with a copy of that evidence. (Rule 76.30) The controlled person must also provide his or her evidence and then the full hearing takes place. If the Court confirms the order, there is a right of appeal on the basis of legal error. (s11)

10. If it is possible for the English legislation to provide these safeguards, particularly in view of the level of threat they experience, why is that not achievable in Australia?

11. While the English provisions do not adopt that model for preventative detention orders, as the November 8 arrests show, to say nothing of arrest and charge for every other criminal offence including murder, it is perfectly possible to bring the arrested person before a court quickly to determine via bail hearing, whether the detention is justified. An analogous process ought to operate for detention orders.

Preventative Detention Hearings

12. There is no full hearing on the merits for preventative detention at all.

13. There is nothing analogous to a bail hearing to review the merits of the decision to detain. Contrast this with the relatively speedy processes for bringing those charged with offences on 8 November 2005 before a court, and the opportunity afforded to them to apply for bail. I am not aware of any public justification for the failure to provide such an opportunity so that, for example, cases of mistaken identity, innocent explanation for evidence relied on by the police, or evidence refuting the evidence relied on by the police could be put before the issuing authority. If national security is an issue, the police can apply for a suppression order.

14. The fact that a judge or magistrate is asked to review the "merits" of preventative detention without any involvement of the detained person at all is a travesty of due process. (s105.12) The reviewing authority will only hear one side of the case. (I leave to one side the constitutionality of any of these procedures.)

15. Similarly, AAT review after detention is completed for the purpose of compensation (s105.51) is no substitute for a contested hearing on the merits of the detention.

16. The relationship between the Commonwealth and State detention power is yet to be spelled out. But a similar hearing process ought to

accompany a decision to extend the initial 48 hour detention period to the 14 day period. (Some sort of review of State orders extending the period of detention to 14 days is hinted at in s105.52, but there is no draft and no detail about how state orders will operate.)

17. Something analogous to a bail hearing ought to occur within a few hours of the person being taken into custody. The court and the detained person ought to be provided with the sort of information provided at a bail hearing, subject to public interest immunity submissions to be decided by the judge.

18. The blanket prohibition on telling family members that you are being detained by the police is needlessly traumatic. Family members may worry, for example, about kidnapping. They may ring State police to report the family member missing. Further, where the fact of police interest in the subjects is widely known, as it was in the November 8 arrests, the blanket restriction is not justifiable.

19. The infringement of legal professional privilege by monitoring communication destroys the privilege: the confidence that the client can fully brief his/her lawyer without fear that the police will use that information against him or her in any way. (s105.38) The provision should be deleted.

20. The Reporting to Parliament (s105.47) should include information about whether the detainee was charged with any offence, subjected to a control order, and whether the basis for the detention was substantiated.

Control Order Hearings

21. The hearing provisions for control orders have improved since the Bill published on the internet. But the Bill as introduced still falls significantly short of the UK model.

22. Most obviously, unlike the UK *Prevention of Terrorism* Act 2005 (Rule 76.30), the Bill does not require the prosecution to serve all the relevant material filed with the court prior to the hearing, and nor does it require the prosecution to serve this information (subject to public interest immunity claims) on the controlled person. The controlled person gets a copy of the order and a summary of the grounds prepared by the prosecution. (s104.12)

23. Indeed, the Bill itself does not make it clear that the controlled person is entitled to see all the information contained in the "request" made to the

court, (s104.3) or the reasons given by the court for the initial control order at any stage. Indeed, the Bill makes it clear that the person's lawyer is not entitled to anything other than the order and the summary. (s104.13) The UK procedure is far better because it is fuller and allows the controlled person to prepare for the hearing, to arrange witnesses, documents and other evidence to meet the police case. The confirmation hearing should not be trial by ambush.

24. At the confirmation hearing, the court must consider the material put before the court which made the original order. (s104.14(3)) However, again, the Bill says nothing about whether the controlled person may see this material. It may be inferred that the controlled person will hear at least the evidence led at the confirmation hearing, but that might not include all the material before the court. Although these problems might be cured because the court is given the power to control proceedings, (s104.14(2)) it should not be left to chance in the atmosphere of secrecy surrounding these cases, and with the repeated references to lawyers not being entitled to see documents other than the order and the summary. These matters should be explicit entitlements.

25. Similarly, where added prohibitions are sought, (s104.23), the police must serve a variety of material on the court. (s104.23(2) The police are

not required to serve the same material on the controlled person. (s104.23(3)). The material should be the same, subject to public interest immunity claims.

26. It is basic to natural justice that the controlled person knows the case against him or her. And the court cannot do its job properly unless the controlled person has the opportunity of contesting the police case.

27. If the United Kingdom – with all the threats it faces – is able to provide a full and proper hearing for its control orders, what reason can there be for failing to do so in Australia?

Sedition

28. In addition to the public criticisms of these provisions, I make the following point.

29. The amendments are said to be based on the Gibbs review which took place almost a decade before the 20 or so Commonwealth Acts which have enacted a large number of dealing with terrorism since September 11, 2001, and the need to modernise the language of the offence and to deal with urging terrorist acts.

30. Given the breadth of the existing law of incitement – which includes incitement to commit any crime of violence, or incitement to commit any of the newer and broadly defined terrorism offences – it is extremely difficult to see the justification for the continued existence of a vague and general offence like sedition.

31. The amendments to the law of sedition should be postponed pending an enquiry by the Australian Law Reform Commission on the continued need for a general offence of sedition in the light of new and specific laws on incitement to violence and incitement to commit terrorist acts. In the interim, the old law of sedition would remain in force.

Miscellaneous

32. The proposed s3ZQO amending the law relating to documents relating to serious offences. This provision should be separated from this Bill on terrorism and separately justified.

33. The removal of the privilege against self-incrimination and legal professional privilege (s3ZQQ) in relation to documents relating to both serious terrorism offences and serious offences should be separated from this Bill and separately justified.

34. The 10 year sunset clause is far too long. At most it should be five years.

MAIN RECOMMENDATIONS

1. The case for preventative detention and control orders has not been proved. The existing criminal law, as recently supplemented by a wide range of broad terrorism offences, balances the need for security with proper protections for individual citizens.

2. If Preventative Detention and Control Orders are introduced, there must be proper judicial hearings to test the merits of the police case.

3. Preventative Detention: There ought to be a hearing procedure - analogous to a bail hearing – within a few hours of the detention, to allow the detainee to test the merits of the detention. A similar hearing ought to be available where there is an extension to the order.

4. Control Orders: The police ought to be required to serve all of the relevant material (subject to security) relied on by the police to the court and the controlled person before the confirmation hearing, as provided in the UK *Prevention of Terrorism Act* 2005.

5. The amendments to the law of sedition should be postponed pending an enquiry by the Australian Law Reform Commission on the continued need for a general offence of sedition in the light of new and specific laws on incitement to violence and incitement to commit terrorist acts.

6. The proposed s3ZQO amending the law relating to documents relating to serious offences and removing Legal Professional Privilege should be removed from the Bill and separately justified.

7. The 10 year sunset clause should be at most five years.

APPENDIX 1

Proof that New Laws Not Needed – Melbourne Age 10/11/05

The arrests of 16 people in Melbourne and Sydney on Tuesday have already been used by supporters of the new anti-terror laws to dismiss the "self-appointed civil liberties lobby" who have criticised the draconian proposals for preventative detention, control orders and new sedition offences in the *Anti-Terrorism Bill*. The threat is real, says Andrew Bolt (Sun-Herald 9/11/05) and these arrests prove that the critics of the Bill were wrong.

This is a spectacular non sequitur. The threat of terrorism is real. But the existing criminal laws and procedures have been used to arrest and charge the suspects with existing offences. This does not show the need for preventative detention, control orders or new sedition laws at all.

The Victorian criminal law has had a range of offences to deal with violent acts for years and years. These apply both to crimes which have been committed, and to crimes which are planned. One of the great furphies in this debate has that the police are powerless to act until a bomb has gone off. This is simply wrong.

It is a crime to commit murder. It is also a crime to conspire with others to commit murder, or to incite others to commit murder. The penalty for each of these offences is a maximum of life. The offence of conspiracy is completed when two or more

agree to commit a murder. Incitement to commit murder is completed when a person urges, encourages or commands another person to commit murder, intending that the other person will commit the murder. There is no requirement that the killing take place.

Possession of bomb making substances has also been an offence in Victoria for many years. It carries a 10 year maximum penalty.

And the Victorian criminal law has been bolstered since the September 11, 2001 attack on the World Trade Centre, by some 20 new pieces of Commonwealth anti-terrorism legislation. This legislation includes offences like being a member of a terrorist organisation, associating with a person who is a member of a terrorist organisation, possessing things connected with terrorist attacks, collecting or making documents likely to facilitate terrorist acts, sending funds to a terrorist organisation, providing support to a terrorist organisation, and providing or receiving training for a terrorist act, to name a few offences.

When this array of preparatory offences is coupled with the new technologies and powers available to police to investigate possible terrorist planning, what is the justification for the new laws? Presumably, Tuesday's arrests are based on evidence gathered by the police using listening devices, telephone taps, surveillance cameras, satellite cameras, informants, direct observation, email communications, and the like. They have also seized documents and computers which will be searched for evidence to support further charges.

And of course, this is what the police should do. If the police have evidence that people are engaged in those sorts of acts, those ought to be arrested and charged under the existing law. Then, as we have seen, those people can be immediately charged and brought before a court. They can have legal representation and hear the allegations and evidence against them, as it presently stands. They can apply for bail which will be granted or denied according to law. The threat of further offending or that the person may abscond will be crucial factors in the bail decision. But there will also be the opportunity for the accused person to demonstrate at an early stage that the police got it wrong, or got the wrong person as occurred in the Bilal (check spelling) case, reported in the Age last week, and so on. As the Rau and Solon cases also show, the authorities are well capable of making serious mistakes when the political climate is overheated.

Then there will be a committal and a trial where the prosecution will lead its evidence and the accused will make their defence.

And most importantly, this will take place in public. The arrests this week were subject to full public scrutiny, as will be the processes in the ensuing weeks as these cases are processed by the courts. Subject to laws relating to suppression of matters involving sensitive information – both for security reasons and in order to ensure a fair trial for the accused – the public will be entitled to know what is going on, and those representing or supporting the accused person can publicly present their point of view.

What is wrong with this sort of process in a free society? The contrast between this and the clandestine and blatantly unfair procedures associated with control orders and preventative detention orders – where still after all the promises about a review on the merits – the Bill entitles the subject of the order to get a "summary" of the prosecution grounds but does not entitle her to see the prosecution evidence – could not be more stark.

If the conduct alleged as the basis of the 16 arrests this week is not the sort of conduct targeted by the preventive detention, control orders and sedition proposals, what sorts of acts is it aimed at? What sort of conduct –according to the government - is beyond the reach of the existing law? Because in the absence of some strong case for saying that the powers exercised this week are defective, proposals for preventive detention, control orders and sedition offences are too vague, lack proper procedural protections and are open to abuse.

Dr D J Neal.
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APPENDIX 2

Prevention of Terrorism Act 2005 (UK)

4 Power of court to make derogating control orders

(1) On an application to the court by the Secretary of State for the making of a control order against an individual, it shall be the duty of the court-

(a) to hold an immediate preliminary hearing to determine whether to make a control order imposing obligations that are or include derogating obligations (called a "derogating control order") against that individual; and

(b) if it does make such an order against that individual, to give directions for the holding of a full hearing to determine whether to confirm the order (with or without modifications).

At the full hearing under s4(1)(b), the following procedures apply.

Order of filing and serving material and written submissions

76.30. Subject to any directions given by the court, the parties must file and serve any material and written submissions, and the special advocate must file and serve any written submissions, in the following order -

(a) the Secretary of State must file with the court all relevant material;

(b) the Secretary of State must serve on -

(i) the relevant party or his legal representative; and

(ii) the special advocate (as soon as one is appointed) or those instructing him,

any open material;

(c) the relevant party must file with the court and serve on the Secretary of State and special advocate (if one is appointed) or those instructing him any written evidence which he wishes the court to take into account at the hearing;

(d) the Secretary of State must file with the court any further relevant material;

(e) the Secretary of State must serve on -

(i) the relevant party or his legal representative, and

(ii) the special advocate (as soon as one is appointed) or those instructing him,

any open material filed with the court under paragraph (d);

(f) the Secretary of State must serve on the special advocate (if one has been appointed) any closed material;

(g) the parties and the special advocate (if one has been appointed) must file and serve any written submissions as directed by the court.

(Rules 76.28 and 76.29 will apply where any closed material is filed by the Secretary of State).

Schedule 1 Prevention of Terrorism Act 2005

4 (5) In this paragraph "relevant material", in relation to any proceedings, means-

(a) any information or other material that is available to the Secretary of State and relevant to the matters under consideration in those proceedings; or

(b) the reasons for decisions to which the proceedings relate.

Note:

(1) There is provision for the Secretary of State to object to producing material on the basis that it would be contrary to the public interest. This is “closed material”. However, the Secretary of State has to justify the “closed material” to the court as a mater of public interest. There is a separate hearing where the Secretary of State has to justify this to the court and the role of the “special advocate” is to contest the withholding of the closed material.

(2) If the controlled person wants to advance material, he or she is under the same obligation to file and serve the material.

APPENDIX 3

This Could Happen to You – Melbourne Herald-Sun 1/11/05

What could you do if the new terrorism preventative detention laws were used against a member of your family? As the Rau and Solon cases show, the authorities can and do make bad mistakes. England has had preventative detention laws since 2001. In that time they detained 895 people. Fifty-five per cent of them were released without charge, including 7 who were held for 10-12 days.

Let's imagine your 21-year-old daughter Jane has had a somewhat troubled adolescence. At the age of 19 she travelled in South-East Asia, became interested in the local social and political issues, and attended talks by some radical religious and political groups. She has now returned to Australia, settled down and found a job in retail sales.

Last Friday at lunchtime you received a call from Jane's workmate who told you that two strongly-built men appeared at the shop and taken Jane away holding her by the arms. Jane had looked worried and frightened.

Frantically, you rang your local police station. They told you they would do what they could, but that they knew nothing about it.

You become more and more worried. Then, finally at 10 pm, you received a phone call from Jane saying that she was safe, but that she could not be contacted for the time being. You asked the obvious questions: "Who is detaining you?" "Where are you?" "When are you coming home?" "Why are they detaining you?" Jane told you that they would not let her answer any of these questions and that she had to hang up. A stern male voice then came on the line and warned you not to tell any other person, including your spouse, anything about the call, except that Jane was safe and that she could not be contacted, or you could be jailed.

Fourteen days passed with no news and countless futile phone calls. You became increasingly frantic.

On the Friday morning, prior to Jane's detention, one AFP officer had applied to another senior AFP officer for a preventive detention order. The application stated that the AFP officer has been informed by a South East Security Agency that Jane is one of a group of people in Melbourne who attended lectures a couple of years ago by freedom fighters in South East Asia. One of those freedom fighters has now travelled to Melbourne and is suspected of planning a terrorist attack on the Melbourne underground. The information led the AFP officer to suspect that Jane's telephone contact book will provide information about the Melbourne address of the freedom fighter.

When Jane arrived at the AFP office, they told her that 24 hour preventative detention order had been made against her and that it may be extended. They told her that she may contact one of her parents, but only to tell them that she is being detained, that she is safe and that she cannot be contacted. They also told her that she could contact a lawyer.

At 6pm on Friday night Jane she spoke to a lawyer and gave him a copy of the detention order. The only information in the order was Jane's name, that she is to be detained for 24 hours. It does not contain any of evidence used against her by the police, or the reasons why the order has been granted. The lawyer told Jane that the new law does not entitle her to find out any of this information and there was really nothing the lawyer could do. Jane was put in a cell overnight.

On Saturday morning, the AFP officer applied to a magistrate to extend the order for another 13 days. Jane was not told about the application to the magistrate. Neither Jane nor her lawyer was entitled to be present to contest the police case. The magistrate extended the order.

You heard nothing until Jane arrived home 14 days later.

When the Prime Minister and the Premiers announced these new powers, they said that there would be proper judicial review to safeguard against mistakes. But the *Anti-Terrorism Bill* 2005 does not contain anything like a fair hearing. Without the right to know the evidence against you and to have a proper hearing to contest the basis for detention, there is nothing you can do. Before anyone is locked up for 14 days, surely there should be a hearing. By the way, it turned out that Jane never had an address book.

Dr D J Neal

Dr Neal is a Victorian barrister, and former Victorian Law Reform Commissioner.