Anti-Terrorism Bill (No 2) 2005

(Please note that my comments follow immediately after the relevant sections)

Schedule 3—Financing terrorism

103.2 Financing a terrorist

(1) A person commits an offence if:
(a) the person intentionally:
(i) makes funds available to another person (whether directly or indirectly); or
(ii) collects funds for, or on behalf of, another person (whether directly or indirectly); and
(b) the first-mentioned person is reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act.

Penalty: Imprisonment for life.

(2) A person commits an offence under subsection (1) even if:
(a) a terrorist act does not occur; or
(b) the funds will not be used to facilitate or engage in a specific terrorist act; or
(c) the funds will be used to facilitate or engage in more than one terrorist act.

COMMENTS:

Clearly, the intentional financing of terrorism is a matter of the utmost seriousness. Nevertheless, the amendments as proposed cause me grave concern on two grounds:

1) The very broad definition of the offense:

a) To take but one possible example, as drafted it seems to me that someone who made a donation to or subscribed to a website which was actively involved in analysing and discussing Iraq from an antiwar perspective could -- were it established at a later date that those behind that website were in turn providing funds in support of terrorism -- be caught by this very broadly defined offense.The donation was after all intentional and how is "reckless" to be defined? That would surely very much depend on who is making the charge and the political climate prevailing at the time.

b) I'm quite certain it is not the intention of those who drafted this amendment or the current government that this offense ever be applied in such a fashion but should not the written law be made as far as is possible proof against unscrupulous, vindictive or careless prosecution in the future?

2) I also find it extraordinary that the penalty should be so draconian, particularly when the offense itself is so broadly defined. Anyone so charged would be desperate to find any sort of accomodation with the authorities which in turn leaves open the potential for the law to be used as an immensely powerful coercive tool.

Schedule 4—Control orders and preventative detention orders

104.15 When a declaration, or a revocation, variation or confirmation of a control order, is in force

(1) If the court declares the interim control order to be void under section 104.14, the order is taken never to have been in force.

(2) If the court revokes the interim control order under section 104.14, the order ceases to be in force when the court revokes the order.

COMMENT:

It seems to me two minor ommissions have been made in this section:

1) In 104.15 (1), the relevant section should be 104.14 (6).

2) In 104.15 (2), the relevant section should be 104.14 (7).

Subdivision G — Contravening a control order

104.27 Offence for contravening a control order

A person commits an offence if:

(a) a control order is in force in relation to the person; and
(b) the person contravenes the order.

Penalty: Imprisonment for 5 years.

COMMENT:

This appears alarmingly terse, particularly when the penalty is so severe.

I may be misunderstanding some aspect of this section but ought there not to be some clarification of the means by which such contravention is to be alleged and eventually established; whether there are gradations of contravention (e.g. unintentional) and finally; whether there is any means of appeal against a charge of contravention.

As it stands, this section would seem to provide the authorities with an extraordinary degree of latitude and as a consequence once again a very powerful coercive tool.

Division 105—Preventative detention orders

105.41 Disclosure offences

(Various)

Penalty: Imprisonment for 5 years.

COMMENT:

This too appears alarmingly terse, particularly when the penalty is so severe.

Ought there not to be some clarification of the means by which such disclosure offenses are to be alleged and eventually established; whether there are gradations of contravention (how easy would it be for a detainee or relation of a detainee to accidentally let slip something he or she shouldn't in what is likely to be a panicked and highly confused state of mind?) and finally; whether there is any means of appeal against a charge of inappropriate disclosure.

As it stands, this section provides the authorities with an extraordinary degree of potentially arbitrary power and as a consequence once again a very powerful coercive tool.

Schedule 5—Powers to stop, question and search persons in relation to terrorist acts

Part IAA—Search, information gathering, arrest and related powers

3UF How seized things must be dealt with

3UG Application to magistrate

(4) If the magistrate is satisfied that there are reasonable grounds to suspect that, if the thing is returned to the owner, the thing is likely to be used by the owner or another person in the commission of a terrorist act or serious offence, the magistrate may make any of the following orders:

(a) that the thing be retained by the police officer for the period specified in the order;
(b) that the thing is forfeited to the Commonwealth;
(c) that the thing is to be sold and the proceeds given to the owner;
(d) that the thing is to be otherwise sold or disposed of.

COMMENT:

Perhaps not a critical issue, but these seizure and forfeiture laws – particularly 4 (b) and 4 (d) where applied to serious offenses as opposed to terrorist acts – seem to be moving Australian law towards that of the USA where I understand such laws have at times been abused. Firstly to put unreasonable pressure on the accused (and others peripherally caught up in the activity) and secondly as a means of providing extra funds for various local, state and federal agencies with all the inappropriate conflicts of interest that may thereby arise.

Schedule 7—Sedition

Crimes Act 1914

4 At the end of section 30A

Add:

(3) In this section:

seditious intention means an intention to effect any of the following purposes:
(a) to bring the Sovereign into hatred or contempt;
(b) to urge disaffection against the following:
(i) the Constitution;
(ii) the Government of the Commonwealth;
(iii) either House of the Parliament;
(c) to urge another person to attempt, otherwise than by lawful means, to procure a change to any matter established by law in the Commonwealth;
(d) to promote feelings of ill-will or hostility between different groups so as to threaten the peace, order and good government of the Commonwealth.

COMMENT:

I understand the whole matter of sedition is to be reviewed in the new year but will comment as if that were not so.

(3) (a) and (3) (b) and to a degree (3) (d) appear exceptionally broad and ill-defined. The definition of sedition suggested in the amendments to the Criminal Code Act 1995 -- Section 80.2, particularly the sections up to and including (6) -- seems a good deal more precise and hence less subject to potential abuse. I unfortunately don't understand enough of the law to know which of these two different definitions will take precedence but this one seems alarmingly archaic and vague.

Criminal Code Act 1995

Part 5.1—Treason and sedition

80.2 Sedition

Urging a person to assist the enemy

(7) A person commits an offence if:
(a) the person urges another person to engage in conduct; and
(b) the first-mentioned person intends the conduct to assist, by any means whatever, an organisation or country; and
(c) the organisation or country is:
(i) at war with the Commonwealth, whether or not the existence of a state of war has been declared; and
(ii) specified by Proclamation made for the purpose of paragraph 80.1(1)(e) to be an enemy at war with the Commonwealth.

Penalty: Imprisonment for 7 years.

Urging a person to assist those engaged in armed hostilities

(8) A person commits an offence if:
(a) the person urges another person to engage in conduct; and
(b) the first-mentioned person intends the conduct to assist, by any means whatever, an organisation or country; and
(c) the organisation or country is engaged in armed hostilities against the Australian Defence Force.

Penalty: Imprisonment for 7 years.

Defence

(9) Subsections (7) and (8) do not apply to engagement in conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature.

Note 1: A defendant bears an evidential burden in relation to the matter in subsection (9). See subsection 13.3(3).
Note 2: There is a defence in section 80.3 for acts done in good faith.

COMMENT:

Two matters appear to be of particular concern:

1) *First, the repeated use of the phrase " . . . to assist, by any means whatsoever . . . . " casts a very wide net indeed should the authorities ever wish to use it to its full. As but one example, it would seem, on the face of it, to include as a possible offense the distribution of material which discusses the "organisation or country" in terms that could be seen as sympathetic. Once again, I'm quite certain it is not the intention of those who drafted this amendment or the current government that*

this offense ever be applied in such a fashion but, as with section 103.2, should not the written law be made as far as is possible proof against unscrupulous, vindictive or careless use in the future?

2) *Section (80.3) is obviously meant to deal with precisely this sort of concern but its force is considerably undermined by the wording of the attached Note: "A defendant bears an evidential burden . . . etc". I assume this phrase – which appears quite often throughout the proposed Bill whenever a means of defense is offered to various offenses -- is intended to place the onus on the accused to prove him or herself worthy of the defense of good faith. Surely reversing something as fundamental and longstanding as the presumption of innocence in this offhand manner is to go one large – and unnecessary -- step too far.*

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