

The Anti-Terrorism Bill (No 2) 2005: When scrutiny, secrecy and security collide¹

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On 3 November 2005 the *Anti-Terrorism Bill (No 2) 2005* was introduced into the federal Parliament. The Bill is the latest in a long line of extensive innovations in the Australian criminal justice system intended to counter terrorism.² The Bill would enable the detention of Australians without charge, trial or conviction, through the use of ‘control orders’ and ‘preventative detention’; extend Australian Federal Police (AFP) powers to stop, question and search suspect individuals; the creation of new crimes of ‘sedition’; and an extension of the basis for ministerial proscription of organizations as ‘terrorist’ organisations to include those ‘advocating’ terrorism. An earlier draft of the Bill had also proposed the introduction of an effective ‘shoot to kill’ policy for police effecting these provisions.

The *Anti-Terrorism Bill (No 2) 2005* has had an unusual yet instructive trajectory. Its provisions, many of which required coincident State legislation, were first mooted in the Prime Minister’s press release of 8 September in which most, but not all, of these key proposals were noted.³ The Council of Australian Governments (COAG) meeting of 27 September 2005 agreed in principle to the federal government’s draft legislation. The meeting had been provided with a secret briefing on terrorism by security agencies and the draft legislation was provided ‘in confidence’ to the State Premiers and Territory Chief Ministers.

¹ This draws on the author’s submission to the Senate Legal and Constitutional Legislation Committee on *the Anti-Terrorism Bill (No 2) 2005*

² Jenny Hocking ‘Protecting democracy by preserving justice: “Even for the feared and the hated”’ *University of New South Wales Law Journal* 27(1) 2004 Thematic Issue: The Legal Response to Terrorism :319-338; ‘Legislation’ at <http://www.nationalsecurity.gov.au>

³ An excellent comparison of the Prime Minister’s press release, the COAG Communique and the draft Bill, can be found in: *Anti-Terrorism Bill 2005: Comparative Table*. Parliament of Australia. Parliamentary Library, Law and Bills Digest Section. 24 October 2005 www.aph.gov.au

Following indications that the government would attempt to rush the Bill into and out of the federal Parliament in a single week, allowing barely one day for a Senate inquiry into its provisions, the ACT Chief Minister John Stanhope released the draft legislation on his website, stating that “all Australians should have the opportunity to see, think about and have input into this legislation. The laws are of such significance that every individual and every organization has the right to have a proper look at the drafts before they are codified into law”.⁴

The draft Bill has since been the subject of both extensive scrutiny and trenchant criticism. The NSW Council for Civil Liberties, Human Rights Watch, ACT Chief Justice Higgins, Australian Federation of Islamic Councils, the Law Council of Australia, Australian Council for Civil Liberties, John von Doussa QC, President of the Human Rights and Equal Opportunity Commission, Australian Lawyers for Human Rights, and the Law Institute of Victoria have all expressed concern at the Bill’s ‘appalling’ provisions.⁵ The leader of the Opposition, Kim Beazley, announced that the proposed new laws did not go far enough.⁶

The preventative detention provisions of the Bill currently before Parliament include the detention, for up to 14 days, including children as young as 16 years old, without charge, without trial, without access to independent legal advice and incommunicado; the use of ‘control orders’ for up to 12 months, indefinitely with repeat orders, includes house arrest, electronic tagging, isolation, restrictions on communication and association. The draft legislation proposes that the grounds for preventative detention would not be made available to the detainee nor to their lawyer, should they be granted one.⁷ Former justice

⁴ *Canberra Times* 15 October 2005

⁵ “‘Appalling’ anti-terrorism laws draw criticism’ 27 September 2005 *ABC News On-line*
<http://www.abc.net.au/news/newsitems/20059/s1469669.htm>

⁶ ‘Anti-terrorism laws do not go far enough: Beazley’ 28 September 2005 *ABC News On-line*
<http://www.abc.net.au/news/newsitems/20059/s1469757.htm>

⁷ Schedule 4 throughout. 105.32 (1) (b) states that ‘a summary of the grounds on which the order is made’ is to be given to the detainee, however, 105.32 (2) states that information will not be included in the summary that is ‘likely to prejudice national security’.

Alastair Nicholson described the Bill's inclusion of a notional 'judicial review' on this basis, as 'a meaningless safeguard'.⁸

The *Anti-Terrorism Bill (No 2) 2005* proposes an extension of the crime of sedition to now include 'urging interference in Parliamentary elections'; and 'urging a person to assist, through any means whatsoever, the enemy'.⁹ This latter component has been criticised by artists, lawyers and some government back-benchers as constituting a serious threat to freedom of speech. In particular, the proposed new sedition offences are considered sufficiently broad to capture reflective, anti-war, sentiments of writers and other artists and to impose drastic sanctions on the reporting of security issues.¹⁰

The government's desire to minimise public and parliamentary scrutiny of the Bill has been matched by extensive secrecy provisions built into it and which make disclosure of key aspects of its implementation, including the mere fact of detention, a criminal offence. For instance, a parent who tells their spouse that their son or daughter is being held in secret preventative detention commits a criminal offence liable to 5 years imprisonment.¹¹

Provisions first proposed as exceptional measures rapidly become incorporated into the broader criminal justice system.¹² The *Anti-Terrorism Bill (No 2) 2005* makes this process of normalisation explicit both in its own description, 'A Bill for an Act to amend the law relating to terrorist acts, and for other purposes', and in the inclusion of 'serious offences' together with 'serious terrorism offences' in its provisions for extensive police powers to stop, question and search individuals without warrant.¹³ The exceptional needs of combating terrorism used to justify the provisions of the *Anti-Terrorism Bill (No 2)*

⁸ Alastair Nicholson 'Farewell to Freedom' *The Age* (corrected version) 13 October 2005

⁹ *Anti-Terrorism Bill 2005* Schedule 7 Subsection 80.2

¹⁰ Karen Kissane 'He's biting and satirical, but is Leunig also guilty of sedition?' *The Age* 10 November 2005

¹¹ *Anti-Terrorism Bill 2005* Schedule 4 105.35

¹² Jenny Hocking *Terror Laws: ASIO, Counter-terrorism and the Threat to Democracy* University of New South Wales Press. Sydney. 2004

¹³ *Anti-Terrorism Bill 2005* Schedule 5 Subdivision 3

2005 have at the same time enabled their extension to include measures that would not otherwise be readily accepted within the criminal justice system.

These political and legal innovations have drastically affected the capacity for citizens to engage in the full and open political communication essential to democratic participation, ‘an informed and engaged public realises the promise of liberal democracy and fulfils its ideal of citizenship’.¹⁴ Good public policy thrives on debate, encourages difference and welcomes dissent. Insulating the security sector from open debate, critique and alternative approaches, cannot lead to the best policy outcomes.

Following this unintended and unanticipated public debate, on 3 November 2005 the Senate referred the *Anti-Terrorism Bill (No 2) 2005* to the Senate Legal and Constitutional Legislation Committee for consideration. Submissions closed on 11 November and the Committee will report on 28 November 2005.

¹⁴ Ian Marsh ‘Opinion formation: Problems and Prospects’ in Saunders, P. and Walter, J. (eds) *Ideas and Influence: Social Science and Public Policy in Australia* University of New South Wales Press. Sydney. 2005 :219-238